




10-1975

## Usery v. Turner Elkhorn Mining Company

Lewis F. Powell Jr.

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RESPONSES: We have both an appellant's reply to motion to affirm and a brief by the UMW & amicus. Both the labor and the mine owners seem to think the case is important, - citing: See although they disagree as to result.

Note

on Reverse Summary

Test. Ind. Coal Operators

The industry contends, however, that the prior summary affirmance in Nat'l Ind Coal was predicated on factual misrepresentation made by SG in his papers to this Court. I have examined the cert. memo and the Dist. Ct. opinion in Nat'l Coal, and it appears that that summary affirmance largely controls this one. DB

Natl. Coal memo attached

3 J/Ct held invalid two provisions of Black Lung Benefit Act that created ineluctable presumption of permanent disability upon establishment of certain facts. DISCUSS

DC erred as Court. does not prohibit imposing this burden on an employer (e.g. workmen comp. acts)

June 5, 1975 Conference  
List 1, Sheet 1

No. 74-1316

TURNER ELKHORN MINING CO.

v.

DUNLOP

Appeal from USDC (E.D. Ky.)

3-Judge Ct (mem opn)

(Lively; Moynahan, Hermansdorfer)

Federal/Civil

Timely

See Preliminary Memo for No. 74-1302.

Hannay

5/28/75

REVERSE  
Summary

DB  
Alo

DB

PRELIMINARY MEMO

June 5, 1975 Conf  
List 1, Sheet 1 .

No. 74-1302

DUNLOP (Sec'y of Labor)

V.

App from USDC (E.D.Ky.)  
3-judge Ct (mem opn)  
(Lively; Moynahan, Hermansdorfer)

TURNER ELKHORN MINING CO. et al.      Federal/ Civil      Timely

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No. 74-1316

TURNER ELKHORN MINING CO.

V.

App from USDC (E.D. Ky.)  
3-judge Ct (mem opn)  
(Lively; Moynahan, Hermansdorfer)

DUNLOP

Federal/ Civil      Timely

SUMMARY: The Govt appeals from a decision of the USDC  
holding two provisions of the Black Lung Benefits Act uncon-  
stitutional. The court held that the question was "not precluded"



by this Court's recent decision in National Independent Coal Operator's Assoc. v. Brennan, No. 73-1902 (October 29, 1974), summarily affirming 372 F.Supp. 16 (D.D.C. 1974).

FACTS: Plaintiffs below (a group of coal mine operators) brought a blunderbuss attack on the 1972 federal legislation known as the Black Lung Benefits Act, 30 U.S.C. §901 et seq. They characterized the legislation as an unconstitutional attempt to grant "reparations" to "financially distressed ex-miners (and their families or survivors) who worked in coal mines in years past and did not have the benefit of workmen's compensation coverage." Plaintiffs criticized Congress' choice of a "profoundly arbitrary and irrational scheme" of shifting the burden of supporting "inactive miners" to the industry and pointed to Railroad Retirement Board v. Alton R. Co., 295 U.S. 330 (1935), for support.

In addition, plaintiffs attacked the eligibility requirements of the statute which used a number of "presumptions" for determining whether a miner was "totally disabled" from a "work related" case of pneumoconiosis (black lung). They argued that such presumptions violated due process because they were effectively rendered irrebutable by practicality and by other provisions of the law and regulations promulgated thereunder. See Owens v. Roberts, 377 F.Supp. 45, 49-50 (M.D. Fla. 1974) (state welfare law fraud provision).

The USDC examined plaintiffs' generalized attack on the statute and found no merit to the claim that the act imposed



liability for "remote claims" where the coal industry did not insure against that particular risk because it was unknown. The court concluded that Congress' policy decision to impose liability for "remote claims" was not unreasonable and noted that plaintiffs had not cited to any authority showing that such liability violates constitutional safeguards. The court distinguished the Alton case on the grounds that the act met the requirement of linking liability to disability related to prior employment.

The USDC, however, had more trouble with plaintiff's attack on the statutory presumptions of the act under §921(c). In particular, it found §921(c)(3) and §921(c)(4) violative of due process. Those provisions state as follows:

"(3) if a miner is suffering or suffered from a chronic dust disease of the lung which (A) when diagnosed by chest roentgenogram, yields one or more large opacities (greater than one centimeter in diameter) and would be classified in category A, B, or C in the International Classification of Radiographs of Pneumoconioses by the International Labor Organization, (B) when diagnosed by biopsy or autopsy, yields massive lesions in the lung, or (C) when diagnosis is made by either means, would be a condition which could reasonably be expected to yield results described in clause (A) or (B), then there shall be an irrebuttable presumption that he is totally disabled due to pneumoconiosis, or that at the time of his death he was totally disabled by pneumoconiosis, as the case may be; and

"(4) if a miner was employed for fifteen years or more in one or more underground coal mines, and if there is a chest roentgenogram submitted in connection with such miner's . . . claim under this title, and it is interpreted as negative with respect to the requirements of paragraph (3) of this subsection, and if other evidence demonstrates the existence of a totally dis-

abling respiratory or pulmonary impairment, then there shall be a rebuttable presumption that such miner is totally disabled due to pneumoconiosis, or that at the time of this death he was totally disabled by pneumoconiosis. . . . The Secretary may rebut such presumption only by establishing that (A) such miner does not, or did not, have pneumoconiosis, or (B) his respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine."

The court concluded as to §921(c)(3) that it was "a departure from the overall pattern of the Act which makes the existence of both the disease and disability two (2) separate factors which must be established before liability is imposed." The USDC pointed to the language of §902(f) which defined "total disability" as the point "when pneumoconiosis prevents him from engaging in gainful employment" and held that §921(c)(3) was "unreasonable and arbitrary" and violative of due process "in precluding the opportunity to present evidence as to the effect of a chronic dust disease upon an individual in determining whether or not he is disabled."

The USDC then appears to have read §921(c)(4) as limiting the evidence that a coal operator may introduce to refute the fact of disability. The court emphasized that pneumoconiosis is not disabling per se and held that requiring evidence that the miner did not have the disease "is irrational where liability is not predicated on the mere presence of the disease, but rather on a complicated state of the disease." In addition, the court found it incompatible with the proviso of §932(c) -- that exempts an operator from liability for black lung disability "which did not arise, at least in part, out of employment in



such mine during the period when it was operated by such operator." The court held that there was "no rational basis" for making the operator prove that the disability did not arise from the miner's employment. Rather, the Govt must prove the operator liable for his mine's involvement in the disease.

CONTENTIONS: The Govt (appellant in No. 74-1302) urges that both provisions are valid legislative judgments. As to the "irrebuttable presumption" of disability in §921(c)(3), the Govt points out that pneumoconiosis, when it reaches the advanced or "progressive" stage in which massive fibrosis and lesions are present, is terminal and irreversible even though there may be only mild pulmonary changes and little or no disability in some patients when detected. The Govt argues that it was a proper legislative judgment to categorize such patients as among those who should be compensated even before the disease has reached its final stage so that they are completely unable to work. Calling these patients "totally disabled" is, the Govt argues, nothing more than a "shorthand method of expression" which takes into account the inevitability of the disease.

As to the limitation on rebuttal evidence in §921(c)(4), the Govt argues that the USDC misread the statute. The presumption does not go into effect until the claimant shows: (1) 15 or more years or mine employment, and (2) a totally disabling respiratory or pulmonary impairment." Only when these are present does the statute presume the existence of pneumoconiosis; nothing precludes a coal operator from introducing evidence

that the precondition of "diability" does not exist. The Govt also criticizes the USDC's conclusion that it is improper to place a burden of proving no employment in the coal mines, but the Govt's argument is quite incomprehensible.

In response to the Govt's arguments, plaintiffs suggest that the "correctness of the District Court's conclusion . . . is manifest," since they are "classic examples of a legislative attempt to enact into existence facts that do not exist in actuality." Plaintiffs (as appellants in No. 74-1316) raise their general attack on the entire Black Lung Act, making a number of policy arguments (it will cost too much; employers will be less likely to hire older workers) as well as their constitutional claim that they are denied due process by a "retroactive" and "constitutionally suspect departure from traditional compensation theory."

The Govt in response to the claims in No. 74-1316 urges that the Court's decision in National Independent Coal Operators Ass'n v. Brennan, No. 73-1902 (Oct. 29, 1974, forecloses any further attack on the validity of the statutory scheme.

DISCUSSION: Regarding plaintiffs' broadside attack on the statutory method of compensating disabled miners, the matter seems clearly to have been resolved by National Independent Coal Operators as one which should rest with Congress. As to the "presumption" issues, the Govt's is most persuasive that § 921(c)(3)'s inclusion of terminal but not yet disabled miners under the definition of "totally disabled" is merely a policy choice within Congress' purview. The Govt is somewhat less convincing regarding the



limitations on rebuttal of § 921(c)(4), partly because the USDC's discussion of this provision is so confusing. All that provision does is to presume that a long-term coal miner with a disabling lung disease does in fact have pneumoconiosis -- a presumption which can be rebutted by the operator's showing that it isn't pneumoconiosis at all or that it was acquired somewhere other than in the coal mines. The provision doesn't forbid an attack on the initial part of the presumption (e. g., the fact that it is "disabling"), nor does it require the operator to carry a burden of proving the negative of something that the Govt should prove. Nothing in the statute, including §932(c), gives an operator the right to compel the Govt to prove that the disease came from the worker's mining experience.

The proof from Congressional hearings was that miners acquired black lung disease working in the mines; it hardly seems startling that Congress chose to permit various inferences from such circumstances to attain the status of rebuttable presumptions which shift to the operator the burden of proving his defense under the statute. It appears that the USDC has taken what are at most slight, superficial inconsistencies between certain provisions in the act and elevated them to the level of constitutional violation without due regard for legislative policy choices. Plenary consideration does not seem necessary, and summary reversal may be in order. This should clear up any confusion as to the meaning of National Independent Coal Operators.

There are motions to affirm.

5/28/75

Hannay

USDC Opn in juris.  
statement.

*Argued* . . . . ., 19...

Assigned . . . . ., 19...

No. 74-1316  
(Vide 74-1302)

Submitted . . . . ., 19...

*Announced* . . . . ., 19...

vs.

JOHN T. DUNLOP, SECRETARY OF THE UNITED STATES DEPARTMENT  
OF LABOR, ET AL.

4/18/75 Appeal filed.

Note  
& Consolidate  
with 1302

[illegible]



Court USDC, E.D. Ky.

Voted on....., 19...

Argued ....., 19...

Assigned ....., 19...

No. 74-1302

Submitted ....., 19...

Announced ....., 19... (Vide 74-1316)

JOHN T. DUNLOP, SECRETARY OF THE UNITED STATES DEPARTMENT  
OF LABOR, ET AL., Appellants

vs.

TURNER ELKHORN MINING COMPANY, ET AL.

4/16/75 Appeal filed.

Note  
&  
Consolidate  
with 1316

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		AB- SENT	NOT VOT- ING	
		G	D	N	POST	DIS	AFF	REV	AFF	G	D			
.....				✓										
Rehnquist, J. ....				✓										
Powell, J. ....				✓										
Blackmun, J. ....								✓						
Marshall, J. ....				✓										
White, J. ....				✓										
Stewart, J. ....				✓										
Brennan, J. ....				✓										
Douglas, J. ....				✓										
Burger, Ch. J. ....														

Join 3

BOBTAIL BENCH MEMORANDUM

TO: Mr. Justice Powell

FROM: Chris Whitman

DATE: November 29, 1975

No. 74-1302 Dunlop v. Turner Elkhorn Mining Company  
No. 74-1316 Turner Elkhorn Mining Company v. Dunlop

I would reverse No. 74-1302 and affirm No. 74-1316, deciding both cases for the Government. This is another example of a circuitously drafted statute that contains a few ambiguities and apparent contradictions. I do not, on balance, think that any of these rises to the level of a due process violation.

Congress apparently went to great lengths to impose the major share of the burden of Black Lung benefits upon the federal government. The imposition of liability on mine operators is retroactive only insofar as operators are made responsible for payments to miners who contracted the disease during their employment, left work before the 1969 effective date of the Act, and discovered their disability after June 30, 1970. As the SG points out, tort liability could be established for this class under settled principles of common law. *But this is not tort liability*

The presumptions are a bit more troublesome. *liability*  
Weinberger v. Salfi, cited by the SG, is of limited relevance,



since this Act creates criteria for the imposition of burdens on private parties, rather than criteria for the receipt of funds from the public treasury. But "rationality" is the standard to apply in any case and was the test adopted by the district court. The test, described in my memo in Lavine v. Milne, is whether the presumption is a rational response to a rationally perceived problem. I do not think the presumptions fail that test.

Put most persuasively, the operators' argument is that Congress failed to articulate the problem that would support the inferences made. That is, Congress could have said that it intended to provide compensation for all miners who have complicated pneumoconiosis (not just those totally disabled by it) and all those who were totally disabled or whose decedent was killed by a serious respiratory ailment that has not been proved to be something other than pneumoconiosis. If this were the express Congressional purpose, <sup>even</sup> the presumptions found unconstitutional by the district court would be rational. The argument is that Congress' express purpose here was only to compensate cases of total disability or death by pneumoconiosis and that the presumptions are therefore overbroad.

There may be a legal argument to be made for striking these presumptions down on the basis that they do not suit the Act's expressed statutory purpose. But this seems

a silly gesture. Congress could easily remedy the problem simply by mouthing the right formula. Moreover, there is sufficient evidence that Congress rationally perceived that overinclusiveness was necessary if the express purpose of the Act was to be effectuated. The SG and the UMW amicus briefs do a good job of describing the problems to which ~~that~~ Congress was responding. And there appears to be support in the legislative history for the proposition that Congress deliberately decided to be overinclusive and to resolve doubts in favor of the miners in order to fully effectuate the purpose of compensating those totally disabled by the disease and the families of the deceased.

The apparent inconsistency in the Act may be due in part to the fact that it was formed in two stages. It was originally passed in 1969, and amendments were made in 1972. The amendments were made because experience in the administration of the Act indicated that somewhat loose, even overinclusive presumptions were necessary if miners were to be compensated to the extent desired by Congress.

It was necessary to presume that an <sup>unidentified respiratory</sup> disease is pneumoconiosis because of the inadequacy of past records (particularly crucial when the question is survivor's benefits and the suffering miner cannot be examined) and because medical techniques are not sufficiently advanced to distinguish all cases of pneumoconiosis from other respiratory disease. The presumption in § 921(c)(3),



of total disability from the presence of the disease in a complicated form, is rational because the disease is in fact irreversible and always <sup>will become</sup> <sup>actually</sup> totally disabling. The point at which it <sup>^</sup> becomes so is hard to define.

The SG convincingly demonstrates that the district court's conclusion that § 921(c)(4)'s limitations on rebuttal evidence were unconstitutional was based on an erroneous reading of the statute. Since the section is premised on a demonstration that the miner is totally disabled, liability is not predicated on a mere finding of disease. Nor is the limitation on rebuttable evidence <sup>- the operator must prove</sup> <sup>^</sup> proof that the miner's impairment did not arise out of employment in "a" mine — unconstitutional. Section 932(c) imposes a proviso on all liability for benefit payments; that proviso, which overrides § 921(c)(4), allows an operator to escape liability for benefits if the death or disability did not arise, at least in part, out of employment in a mine operated by him.

Chris

No. 74-1302 DUNLOP v. TURNER ELKHORN MINING CO.  
No. 74-1316 TURNER ELKHORN MINING CO. v. DUNLOP

*Reverse*

*affirm* Argued 12/2/75



## McC Mahan (for mining cos)

Crucial provisions are in Part C -  
that impose retroactive benefits

All applicants whose employment  
ended prior to enactment of statute  
may assert claims ~~to~~ retroactively  
vs their employers.

Not a <sup>true</sup> workmen's compensation law  
in view of its retroactive application.

No one knew disease existed at  
time much of this disability occurred.

~~The~~ Use of a "workmen's comp."  
rationale for retroactive application  
is violation of D/P. The irrationality  
of means results in deprivation  
of prop. Does not ~~do~~ claim  
a "taking" w/out compensation.

Second major issue is validity  
of the rebuttal presumption. There  
are "plain evidential" presumptions.

~~Concededly Congress has power to~~  
~~provide~~ Result of presumption (&  
limitations on ~~a~~ rebuttal) is that many  
claimants are compensated whose  
disability is not related to coal dust,

Wallace (56)

77  
Difference bet. this case & one  
we decided (affirmed w/o argument) last  
Term is that 38/ct in this case

Salpi reiterated many of principles  
applicable here.

The "retroactivity" provision of Part C  
apply only to miners who meet two  
conditions: (i) must have ceased work  
as miners before effective date  
of Act, & (ii) must have become disabled  
after the effective date.

DC did not ~~understand~~ understand  
how presumptions ~~operate~~ operate.  
Ignored § 422(c). There is always  
a possibility of making a defense  
to a claim

There is a substantive D/P  
claim. See Optical Co 348 U.S. 483.

(There may be an E/P claim  
as the classification of employers  
made liable here may discriminate  
in favor of employers who entered  
or expanded coal mining business after 1969)



McWaham (Rebuttal)

Part C program is a  
reparation - not a compensation  
- program. The Act  
redefined the disease:  
suddenly ~~and~~ almost every  
lung disease is legislatively  
found to be caused by coal dust.

80% of claimants have  
not worked in mines for  
years.

To: Justice Powell

Date: Dec. 3, 1975

From: Chris

Re: No. 74-1302 Dunlop v. Turner Elkhorn Mining Co.  
No. 74-1316 Turner Elkhorn Mining Co. v. Dunlop

I expressed some concern about the presumption in § 921(c)(3), which reads as follows (with my organization for clarity's sake):

"...if a miner is suffering or suffered from a chronic dust disease of the lung which

(A) when diagnosed by chest roentgenogram, yields one or more large opacities (greater than one centimeter in diameter) and would be classified in category A, B, or C in the International Classification of Radiographs of Pneumoconioses by the International Labor Organization,

(B) when diagnosed by biopsy or autopsy, ~~xx~~ yields massive lesions in the lung,

or (C) when diagnosis is made by either means, would be a condition which could reasonably be expected to yield results described in clause (A) or (B),

then there shall be an irrebuttable presumption that he is totally disabled due to pneumoconiosis, or that at the time of his death he was totally disabled by pneumoconiosis, as the case may be; ..."

I was concerned about the irrebuttable presumption that the disease was pneumonconiosis; no evidence that it was not will be received. But, as I told you, I think this is not unreasonable because Congress could not determine an accurate and commonly accepted definition of the disease. In effect, this serves as a definition.

for another reason --

The court below found this presumption unconstitutional/because it irrebutably presumed disability from ~~x~~ evidence of the existence of disease. I addressed that point in my memo -- I think it reasonable given the fact that the disease is always irreversible once it becomes chronic. If the conditions described are met, I ~~xxx~~ take it, Congress has concluded that total disability will follow inevitably; ~~xxx~~ there is medical testimony to support that assessment.



74-1302 *Dunlop v. Turner Elkhorn*  
 74-1316 *Turner Elkhorn v. Dunlop*

C.J.

Congress had few options.

Act is over-inclusive.

There is general welfare legislation, as to which

Congress has great lee-way.

Once Congress undertook this leg., the presumptions may be necessary. But the inevitable presumption is troublesome.

Reverse 74-1302  
 Brennan, J. Affirm 74-1316

Complex & difficult

case: (c)(3) and (c)(4) are troublesome & both seem inevitable in practice.

Congress could have provided that all miners with any respiratory disease must be compensated.

Can't treat (c)(3) and (c)(4) differently.

Troubled by this case, especially as to presumptions - vote is tentative.

74-1302 Affirm + Reverse  
 Stewart, J. 74-1316 Affirm

atrocious legislation - but under his view of 5<sup>th</sup> Amend.

DC misunderstood (c)(4). DC was right probably as to (c)(3) (Affirm DC as to this)

Is shockingly unfair legislation.

1302 - Revere

1316 - Affirm

Agrees that this  
is amazing legislature  
- can't imagine how  
it got thru Congress.

But is welfare  
leg.

Presumptions are  
rough - but in narcotics  
cases we have sustained  
similar presumptions

Powell, J. 1302 - Revere

1316 - Affirm

1302 - Revere

1316 - Affirm

Blackmun, J. ~~1302 - Revere~~  
1316 - Affirm

The case we affirmed  
summarily "looks the way"

~~(2)(3)~~

(2)(3) is most irrational  
provision, but will  
accept it.

Rehnquist, J.

1302 - Revere

1316 - Affirm



*Chavez* Retroactive effect - 11

27P

*There are limitations on what Congress may impose retrospectively - 12*  
*liability not imposed because of blame or deterrence - 13*

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist  
Mr. Justice Stevens

From: Mr. Justice Marshall

Circulated: APR 1 1976

Recirculated: \_\_\_\_\_

Railroad Retirement Board

v. Elton RR - 295 U.S. 330 - 15

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 74-1302 AND 74-1316

*Relies on  
w/ Comp.  
principles - 11*

W. J. Usery, Jr., Secretary  
of the United States De-  
partment of Labor;  
et al., Appellants,

74-1302 v.

Turner Elkhorn Mining  
Company et al.

Turner Elkhorn Mining  
Company et al.,  
Appellants,

74-1316 v.

W. J. Usery, Jr., Secretary  
of the United States De-  
partment of Labor,  
et al.

On Appeals from the United  
States District Court for  
the Eastern District of  
Kentucky.

[April —, 1976]

MR. JUSTICE MARSHALL delivered the opinion of the  
Court.

Twenty-two coal mine operators (the "Operators") brought this suit to test the constitutionality of certain aspects of Title IV of the Federal Coal Mine Health and Safety Act of 1969, 83 Stat. 792, as amended by the Black Lung Benefits Act of 1972, 86 Stat. 150, 30 U. S. C. § 901 et seq. (1970 ed. and Supp. IV). The Operators, potentially liable under the amended Act to compensate certain miners, former miners, and their survivors for death or total disability due to pneumoconiosis arising out of employment in coal mines, sought declaratory and in-

junctive relief against the Secretary of Labor and the Secretary of Health, Education, and Welfare, who are responsible for the administration of the Act and the promulgation of regulations under the Act.

On cross-motions for summary judgment, a three-judge District Court for the Eastern District of Kentucky, convened pursuant to 28 U. S. C. §§ 2282 and 2284, found the amended Act constitutional on its face, except in regard to two provisions concerning the determination of a miner's total disability due to pneumoconiosis. The Court enjoined the Secretary of Labor from further application of those two provisions. 385 F. Supp. 424 (1974). After granting a stay of the three-judge court's order, 421 U. S. 944 (1975), we noted probable jurisdiction of the cross-appeals. 421 U. S. 1010 (1975). We conclude that the amended Act, as interpreted, is constitutionally sound against the Operators' challenges.

# I

Coal workers' pneumoconiosis—black lung disease—affects a high percentage of American coal miners with severe, and frequently crippling, chronic respiratory impairment.<sup>1</sup> The disease is caused by long-term inhalation of coal dust.<sup>2</sup> Coal workers' pneumoconiosis (here-

<sup>1</sup> The House and Senate Reports on the 1969 Act placed the number of afflicted active and retired miners at 100,000. S. Rep. No. 411, 91st Cong., 1st Sess., at 6 (1969), and H. R. Rep. No. 563, 91st Cong., 1st Sess., at 17 (1969). The Senate Report, *supra*, at 7, specified that, on the basis of X-ray examination, the disease rate was 10% for then-active coal miners, and 20% for inactive coal miners. Other estimates have run significantly higher. See, e. g., Hearings on S. 355, before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 91st Cong., 1st Sess., Part 2, at 641 (1969).

<sup>2</sup> Coal workers' pneumoconiosis is a distinct clinical entity, and is not the only type of pneumoconiosis. The remarks of the Surgeon General, reproduced in H. R. Rep. No. 563, 91st Cong., 1st Sess.,



after "pneumoconiosis") is generally diagnosed on the basis of X-ray opacities indicating nodular lesions on the lungs of a patient with a long history of coal dust exposure. As the Surgeon General has stated, however, post-mortem examination data have indicated a greater prevalence of the disease than X-ray diagnosis reveals.

According to the Surgeon General, pneumoconiosis is customarily classified as "simple" or "complicated."<sup>3</sup> Simple pneumoconiosis, ordinarily identified by x-ray opacities of a limited extent, is generally regarded by physicians as seldom productive of significant ventilatory impairment. Complicated pneumoconiosis, generally far more serious, involves progressive massive fibrosis as a complex reaction to dust and other factors (which may include tuberculosis or other infection), and usually<sup>4</sup> produces significant pulmonary impairment and marked respiratory disability. This disability limits the victim's physical capabilities, may induce death by cardiac failure, and may contribute to other causes of death.<sup>5</sup>

Removing the miner from the source of coal dust has so far proved the only effective means of preventing the contraction of pneumoconiosis, and once contracted the disease is irreversible in both its simple and complicated stages. No therapy has been developed. Finally, because the disease is progressive,<sup>6</sup> at least in its com-

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at 15 (1969), indicate that the pathological condition of pneumoconiosis may also be caused by inhalation of other dusty materials, such as cotton fibers or silica.

<sup>3</sup> S. Rep. No. 411, 91st Cong., 1st Sess., at 7-8 (1969); H. R. Rep. No. 563, 91st Cong., 1st Sess., at 15-16 (1969).

<sup>4</sup> There was evidence before Congress that the complicated stage of the disease is sometimes exhibited with "mild pulmonary function changes and little or no disability." Hearings on S. 355, *supra*, n. 1, at 858.

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.*



## 4 USERY v. TURNER ELKHORN MINING CO.

plicated stage, its symptoms may become apparent only after a miner has left the coal mines.

In order to curb the incidence of pneumoconiosis, Congress provided in Title II of the Coal Mine Health and Safety Act of 1969, § 201 *et seq.*, 30 U. S. C. § 841 *et seq.*, for limits on the amount of dust to be permitted in the ambient air of coal mines. Additionally, in view of the then-established prevalence of irreversible pneumoconiosis among miners, and the insufficiency of state compensation programs, Congress passed Title IV of the 1969 Act, § 401 *et seq.*, 30 U. S. C. § 901 *et seq.* (1970 ed.), to provide benefits to afflicted miners and their survivors. These benefit provisions were subsequently broadened by the Black Lung Benefits Act of 1972. 30 U. S. C. § 901 *et seq.* (Supp. IV).

As amended, the Act divides the financial responsibility for payment of benefits into three parts. Under Part B of Title IV, §§ 411-414, 30 U. S. C. §§ 921-924 (1970 ed. and Supp. IV), claims filed between December 30, 1969, the date of enactment, and June 30, 1973, are adjudicated by the Secretary of Health, Education, and Welfare and paid by the United States.<sup>7</sup>

Under Part C of Title IV, §§ 421-431, 30 U. S. C. §§ 931-941 (1970 ed. and Supp. IV), claims filed after December 31, 1973, are to be processed under an applicable state workmen's compensation law approved by the Secretary of Labor under the standards set forth in § 421, 30 U. S. C. § 931 (1970 ed. and Supp. IV). In the absence of such an approved state program, and to

<sup>7</sup> As of December 31, 1974, 556,200 claims had been filed under Part B of the law. As of that date, with all but 400 cases decided, 509,900 individuals had established eligibility as black lung beneficiaries under the Act. Department of Health, Education, and Welfare, Fifth Annual Report to Congress on the Administration of Part B of Title IV of the Federal Coal Mine Health and Safety Act of 1969, at 3 (1975).

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date no state program has been approved, claims are to be filed with and adjudicated by the Secretary of Labor, and paid by the mine operators. § 422, 30 U. S. C. § 932 (1970 ed. and Supp. IV). Under § 422 an operator, who is entitled to a hearing in connection with these claims, is liable for Part C benefits with respect to death or total disability due to pneumoconiosis arising out of employment in a mine for which the operator is responsible. The operator's liability for Part C benefits covers the period from January 1, 1974, to December 30, 1981. Payments of benefits under Part C are to the same categories of persons—a miner or certain survivors—and in the same amounts, as under Part B. §§ 422 (c), (d); see § 412 (a), 30 U. S. C. § 922 (a) (1970 ed. and Supp. IV).<sup>8</sup>

Claims filed during the transition period between Federal Government benefit provision under Part B, and state plan or operator benefit provision under Part C—that is, July 1 to December 31, 1973—are adjudicated under § 415 of Part B, 30 U. S. C. § 925 (Supp. IV), by the Secretary of Labor. The United States is responsible

<sup>8</sup> The individual claimant is entitled to benefits at a rate equal to 50% of the minimum monthly payment to which a totally disabled federal employee in Grade GS-2 is entitled. § 412(a)(1), 30 U. S. C. § 922 (a)(1). At current rates, the individual claimant's entitlement is \$196.80 per month, or \$2,361.60 per year. 40 Fed. Reg. 56886-56887 (Dec. 5, 1975); see 20 CFR § 410.510 (1975). These basic benefits are increased if the claimant has dependents; the maximum increase of 100% is available if the claimant has 3 or more dependents. 30 U. S. C. § 922 (a)(4) (Supp. IV). See also 30 U. S. C. § 922 (a)(3), (5) (Supp. IV). Thus, the maximum in benefits to which a claimant could be entitled is \$393.50 per month, or \$4,722 per year. Benefits under Part C are reduced to account for certain alternative income. § 422 (g), 30 U. S. C. § 932 (g). In addition to these monthly benefits, the operators are responsible for claimants' medical expenses. See § 422 (a), 30 U. S. C. § 932 (a) (Supp. IV), incorporating 33 U. S. C. § 907 (Supp. IV).

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for payment on these claims until December 31, 1973. Responsible operators, having been notified of a claim and entitled to participate in a hearing thereon, are thereafter liable for benefits as if the claim had been filed pursuant to Part C and § 422 had been applicable to the operator.

The Act provides that a miner shall be considered "totally disabled," and consequently entitled to compensation, "when pneumoconiosis prevents him from engaging in gainful employment requiring the skills and abilities comparable to those of any employment in a mine or mines in which he previously engaged with some regularity and over a substantial period of time." § 402 (f), 30 U. S. C. § 902 (f) (Supp. IV).<sup>9</sup> The Act also prescribes several "presumptions" for use in determining compensable disability.<sup>10</sup> Under § 411(c)(3), a miner shown by X-ray or other clinical evidence to be afflicted with complicated pneumoconiosis is "irrebuttably pre-

<sup>9</sup> Section 402 (f) provides in full:

"The term 'total disability' has the meaning given it by regulations of the Secretary of Health, Education, and Welfare, except that such regulations shall provide that a miner shall be considered totally disabled when pneumoconiosis prevents him from engaging in gainful employment requiring the skills and abilities comparable to those of any employment in a mine or mines in which he previously engaged with some regularity and over a substantial period of time. Such regulations shall not provide more restrictive criteria than those applicable under section 423 (d) of Title 42." 30 U. S. C. § 902 (f) (Supp. IV).

The Act defines "pneumoconiosis" as "a chronic dust disease of the lung arising out of employment in a coal mine." § 402 (b), 30 U. S. C. § 902 (b) (Supp. IV).

<sup>10</sup> These presumptions are applicable directly to Part B adjudications by the Secretary of HEW, and indirectly to transition period and Part C adjudications by the Secretary of Labor by operation of §§ 422 (h) and 411 (b), 30 U. S. C. §§ 932 (h); 921 (b) (Supp. IV). See also §§ 422 (f) (2); 430, 30 U. S. C. §§ 932 (f) (2); 940 (Supp. IV).



sumed" to be totally disabled due to pneumoconiosis; if he has died, it is irrebuttably presumed that he was totally disabled by pneumoconiosis at the time of his death, and that his death was due to pneumoconiosis. 30 U. S. C. § 921 (c)(3) (Supp. IV). In any event, the presumption operates conclusively to establish entitlement to benefits.

The other presumptions are each explicitly rebuttable by an operator seeking to avoid liability. There are three such presumptions. First, if a miner with 10 or more years' employment in the mines contracts pneumoconiosis, it is rebuttably presumed that the disease arose out of such employment. § 411 (c)(1), 30 U. S. C. § 921 (c)(1) (Supp. IV). Second, if a miner with 10 or more years' employment in the mines died from a respirable disease, it is rebuttably presumed that his death was due to pneumoconiosis. § 411 (c)(2), 30 U. S. C. § 921 (c)(2) (Supp. IV). Finally, if a miner, or the survivor of a miner, with 15 or more years' employment in underground coal mines is able, despite the absence of clinical evidence of complicated pneumoconiosis, to demonstrate a totally disabling respiratory or pulmonary impairment, the Act rebuttably presumes that the total disability is due to pneumoconiosis, that the miner was totally disabled by pneumoconiosis when he died, and that the miner's death was due to pneumoconiosis. § 411 (c)(4), 30 U. S. C. § 921 (c)(4) (Supp. IV).<sup>11</sup> Section 411 (c)(4) specifically provides that "[t]he Secretary may rebut [this latter] presumption only by establishing that (A) such miner does not, or did not, have pneumoconiosis, or that (B) his respiratory or pulmonary impairment did not arise out of, or in connection with, employment

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<sup>11</sup> The use of this presumption in Part C adjudications is limited in some regards not significant in this case. See §§ 421 (f)(2); 430, 30 U. S. C. §§ 931 (f)(2); 940 (Supp. IV).

in a coal mine." Moreover, under § 413 (b), 30 U. S. C. § 923 (b) (Supp. IV), none of these three rebuttable presumptions may be defeated solely on the basis of a chest X-ray.<sup>12</sup>

## II

In initiating this suit against the defendant Secretaries (hereafter the "Federal Parties"), the Operators contended that the amended Act is unconstitutional insofar as it requires the payment of benefits with respect to miners who left employment in the industry before the effective date of the Act; that the Act's definitions, presumptions, and limitations on rebuttal evidence unconstitutionally impair the operator's ability to defend against benefit claims; and that certain regulations promulgated by the Secretary of Labor regarding the apportionment of liability for benefits among operators, and the provision of medical benefits, are inconsistent with the Act and constitutionally defective.

The three-judge District Court held that all issues as to the validity of the challenged regulations were within the jurisdiction of a single district judge, and the Court entered an order so remanding them. 385 F. Supp., at 426. The District Court upheld each challenged statu-

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<sup>12</sup> Section 413 (b) provides in pertinent part: "... no claim for benefits *under this part* shall be denied solely on the basis of the results of a chest roentgenogram." 30 U. S. C. § 923 (b) (Supp. IV) (emphasis added). Section 413 (b) is found in Part B of Title IV. Section 430, 30 U. S. C. § 940 (Supp. IV), provides, however, that "[t]he amendments made by the Black Lung Benefits Act of 1972 to part B... shall, to the extent appropriate, also apply [with limitations not relevant here] to ... part [C]." The legislative history, moreover, makes clear that the § 413 (b) limitation on use of X-ray evidence, enacted as § 4 (f) of the 1972 Act, was intended to apply to Part C claims as well as Part B claims, see H. R. Rep. No. 1048, 92d Cong., 2d Sess., at 9 (1972), and the Operators so concede. Brief for Operators, at 21.



tory provision as constitutional, with two exceptions. First, the District Court held that § 411 (c)(3)'s irrebuttable presumption is unconstitutional as an unreasonable and arbitrary legislative finding of total disability "in terms other than those provided by the Act as standards for total disability." 385 F. Supp., at 430. Second, reading the limitation on evidence in rebuttal to § 411 (c)(4)'s presumption of total disability due to pneumoconiosis to apply to an operator's defense in a § 415 transition period case, the District Court found that limitation unconstitutional in two respects. It held the limitation arbitrary and unreasonable in not permitting a rebuttal showing that the case of pneumoconiosis afflicting the miner was not disabling. 385 F. Supp., at 430. And taking the provision to mean that an operator may defend against liability only on the ground that the pneumoconiosis did not arise out of employment in *any* coal mine, rather than on the ground that it did not arise out of employment in a coal mine for which the operator was responsible, the District Court found the provision an unreasonable and arbitrary limitation on rebuttal evidence relevant and proper under § 422 (c), 30 U. S. C. § 932 (c) (1970 ed.). 385 F. Supp., at 430-431. The District Court accordingly entered an order declaring unconstitutional, and enjoining the Secretary of Labor from seeking to apply, § 411 (c)(3)'s irrebuttable presumption and § 411 (c)(4)'s limitation on rebuttable evidence.

The Operator's appeal, No. 74-1316, reasserts the constitutional challenges rejected by the District Court. The appeal of the Federal Parties, No. 74-1302, seeks reversal of the declaration and injunction respecting the constitutionality of §§ 411 (c)(3) and (4). Neither side here questions the District Court's decision not to address the issues raised with respect to the Secretary of Labor's

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regulations. As we have already noted, we uphold the statute against all the constitutional contentions properly presented here. Because we read the limitation on rebuttal evidence in § 411 (c)(4) as inapplicable to the operators, however, we vacate that portion of the District Court's order which invalidates that limitation.

## III

The Federal Parties direct our attention initially to *National Independent Coal Operators Assn. v. Brennan*, 372 F. Supp. 16 (DC), summarily aff'd, 419 U. S. 955 (1974), which raised a number of issues identical to those presented here. Our affirmance in that case did not foreclose the District Court's determination of unconstitutionality regarding §§ 411 (c)(3) and (4), those issues not having been before us on the appeal. Several questions presented here—most notably those of retroactivity and preclusion of sole reliance on X-ray testimony evidence—were raised and decided in *National Independent Coal Operators Assn. v. Brennan*, but having heard oral argument and entertained full briefing on these issues together with the other questions raised in the case, we proceed to treat them here more fully. Cf. *Edelman v. Jordan*, 415 U. S. 651, 670-671 (1974).

## IV

The Operators contend that the amended Act violates the Fifth Amendment Due Process Clause by requiring them to compensate former employees who terminated their work in the industry before the Act was passed, and the survivors of such employees.<sup>13</sup> The Operators

<sup>13</sup> For simplicity of discussion, we will generally refer to claims as though presented by the miner himself, although they may in fact be maintained upon death by a survivor. Neither the parties nor the District Court have distinguished miners' claims from survivors' claims under the constitutional attacks raised in this case.

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accept the liability imposed upon them to compensate employees working in coal mines now and in the future who are disabled by pneumoconiosis; and they recognize Congress' power to create a program for compensation of disabled inactive coal miners. But the Operators complain that to impose liability upon them for former employees' disabilities is impermissibly to charge them with an unexpected liability for past, completed acts that were legally proper and, at least in part, unknown to be dangerous at the time.

*Permissible  
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It is by now well established that legislative acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way. See, e.g., *Ferguson v. Skrupa*, 372 U. S. 726 (1963); *Williamson v. Lee Optical Co.*, 348 U. S. 483, 487-488 (1955). And this Court long ago upheld against due process attack the competence of Congress to allocate the interlocking economic rights and duties of employers and employees upon "workmen's compensation principles" analogous to those enacted here, regardless of contravening arrangements between employer and employee. *New York Central R. Co. v. White*, 243 U. S. 188 (1917); see also *Philadelphia, Baltimore & Washington R. Co. v. Schu- bert*, 224 U. S. 603 (1912).

To be sure, insofar as the Act requires compensation for disabilities bred during employment terminated before the date of enactment, the "Act has some retro-  
spective effect"—although, as we have noted, the Act imposes no liability on the operators until 1974.<sup>14</sup> And

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<sup>14</sup> The Federal Parties suggest that since a claim for benefits under Part C must be filed within three years of the discovery of total disability due to pneumoconiosis (or the date of death), § 422



12 USERY v. TURNER ELKHORN MINING CO.

~~we may assume~~  
~~it may be~~ that the liability imposed by the Act for disabilities suffered by former employees was not anticipated at the time of actual employment.<sup>15</sup> But our cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations. See *Flemming v. Rhodes*, 331 U. S. 100 (1947); *Carpenter v. Wabash R. Co.*, 309 U. S. 23 (1940); *Norman v. Baltimore & Ohio R. Co.*, 294 U. S. 240 (1935); *Home Building & Loan Assn. v. Blaisdell*, 290 U. S. 398 (1934); *Louisville & Nashville R. Co. v. Mottley*, 219 U. S. 467 (1911). This is true even though the effect of the legislation is to impose a new duty or liability based on past acts. See *Lichter v. United States*, 334 U. S. 742 (1948); *Welch v. Henry*, 305 U. S. 134 (1938); *Funkhouser v. J. B. Preston Co.*, 290 U. S. 163 (1933).

It does not follow, however, that what Congress can legislate prospectively it can legislate retrospectively. The retrospective aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former. Thus, in this case the justification for the retrospective imposition of liability must take into ac-

(f)(1), 30 U. S. C. § 932 (f)(1) (Supp. IV), the operators will not ordinarily be liable for any disabilities maturing before enactment of their responsibility. See also § 422 (f)(2), 30 U. S. C. § 932 (f)(2) (Supp. IV). This does not hold true, however, for nonunderground operators, since Part C liability did not apply to them until 1972. See Black Lung Benefits Act of 1972, § 3, 86 Stat. 153, amending §§ 401; 402 (b), (d); 411 (c)(1), (2); 422 (a), (h); 423 (a), 30 U. S. C. §§ 901; 902 (b), (d); 921(c)(1), (2); 932 (a), (h); 933 (a) (Supp. IV). In any event, we think the point unnecessary to our conclusion.

<sup>15</sup> The Operators have not contended, however, that the Act is constitutionally defective insofar as it requires them to provide compensation for present employees whose disabilities may stem from exposure that was terminated before enactment of the Act.

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 Spol SA? Norman - gold clause  
 K clause Home Building - mortgage moratorium  
 Spol SA Mottley - railroad passes



count the possibilities that the Operators may not have known of the danger of their employees' contracting pneumoconiosis, and that even if they did know of the danger their conduct may have been taken in reliance upon the current state of the law, which imposed no liability on them for disabling pneumoconiosis.<sup>16</sup> While the Operators have clearly been aware of the danger of pneumoconiosis for at least 20 years,<sup>17</sup> and while they have not specifically pressed the contention that they would have taken steps to reduce or eliminate the incidence of pneumoconiosis had the law imposed liability upon them, we would nevertheless hesitate to approve the retrospective imposition of liability on any theory of deterrence, cf. *United States v. Peltier*, 422 U. S. 531, 542 (1975), or blameworthiness, cf. *id.*; *DeVeau v. Braisted*, 363 U. S. 144, 160 (1960).

We find, however, that the imposition of liability for the effects of disabilities bred in the past is justified as a rational measure to spread the costs of the employees'

<sup>16</sup> Whether or not a person who could have anticipated the potential liability attaching to his chosen course of conduct would have avoided the liability by altering his conduct has been significant in at least one line of cases in this Court. In *Welch v. Henry*, 305 U. S. 134 (1938), the Court upheld against a due process attack a state statute enacted in 1935 taxing 1933 dividend income that the 1933 taxing statute had explicitly exempted. Adopting the view that a stockholder would have continued to receive corporate dividends even if he knew that the dividends would subsequently be taxed, the Court distinguished prior cases invalidating the retroactive taxation of gifts on the ground that the donor might have refrained from making the gift had he anticipated the tax. *Id.*, at 147-148. But see *Carpenter v. Wabash R. Co.*, 309 U. S. 23 (1940); *Louisville & Nashville R. Co. v. Mottley*, 219 U. S. 467 (1911).

<sup>17</sup> Coal miner's pneumoconiosis was recognized in Great Britain as early as 1943. It was not generally recognized in the United States as an entity distinct from silicosis until the 1950's. S. Rep. No. 411, 91st Cong., 1st Sess., at 8 (1969).

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disabilities to those who have profited from the fruits of their labor—the operators and the coal consumers. The Operators do not challenge Congress' power to impose the burden of past mine working conditions on the industry. They do claim, however, that the Act spreads costs in an arbitrary and irrational manner by basing liability upon past employment relationships, rather than taxing all coal mine operators presently in business. The Operators note that a coal mine operator whose work force has declined may be faced with a total liability that is disproportionate to the number of miners currently employed. And they argue that the liability scheme gives an unfair competitive advantage to new entrants into the industry, who are not saddled with the burden of compensation for inactive miners' disabilities. In essence the Operators contend that competitive forces will prevent them from effectively passing on to the consumer the costs of compensation for inactive miners' disabilities, and will unfairly leave the burden on the early operators alone.

Of course, as we have already indicated, a substantial portion of the burden for disabilities stemming from the period prior to enactment is born by the Federal Government. But even taking the Operators' argument at face value, it is for Congress to choose between imposing the burden of inactive miners' disabilities on all operators, including new entrants and farsighted early operators who might have taken steps to minimize black lung dangers, or to impose that liability solely on those early operators whose profits may have been increased at the expense of their employees' health. We are unwilling to assess the wisdom of Congress' chosen scheme by examining the degree to which the "cost-savings" enjoyed by operators in the pre-enactment period produced "excess" profits, or the degree to which the retrospective liability imposed

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on the early operators can now be passed on to the consumer. It is enough to say that the Act approaches the problem of cost-spreading rationally; whether a broader cost-spreading scheme would have been wiser or more practical under the circumstances is not a question of constitutional dimension. See, e. g., *Ferguson v. Skrupa*, 372 U. S. 726, 730-732 (1963); *Williamson v. Lee Optical Co.*, 348 U. S. 483, 488 (1955).

The Operators ultimately rest their due process argument on *Railroad Retirement Board v. Alton R. Co.*, 295 U. S. 330 (1935), in which the Court found the Railroad Retirement Act of 1934 to be unconstitutional. Among the provisions specifically invalidated as arbitrary was a provision for employer-financed pensions for former employees who, though not in the employ of the railroads at the time of enactment, had been so employed within the year. Assuming that the portion of *Alton* invalidating this provision retains vitality,<sup>18</sup> we find it distinguishable from this case. The point of the black lung benefit provisions is not simply to increase or supplement a former employee's salary to meet his generalized need for funds. Rather, the purpose of the Act is to satisfy a specific need created by the dangerous conditions under which the former employee labored—to allocate to the mine operator an actual, measurable cost of his business.

In sum, the Due Process Clause poses no bar to requiring an operator to provide compensation for a former employee's death or disability due to pneumoconiosis arising out of employment in its mines, even if the former employee terminated his employment in the industry before the Act was passed.

<sup>18</sup> Chief Justice Hughes, joined by Justices Brandeis, Stone and Cardozo, dissented from the Court's invalidating the Railroad Retirement Act altogether, but agreed with the Court that the provision for allowances to former employees was arbitrary. 295 U. S., at 374, 389.

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## V

We turn next to a consideration of the Operators' challenge to the "presumptions" and evidentiary rules governing adjudications of compensable disability under the Act.

## A

The Act prescribes two alternate methods for showing "total disability," which is a prerequisite to compensation. First, a miner is "totally disabled" under the definition contained in § 402 (f), if pneumoconiosis, simple or complicated,

"prevents him from engaging in gainful employment requiring the skills and abilities comparable to those of any employment in a mine or mines in which he previously engaged with some regularity and over a substantial period of time."<sup>19</sup>

Second, if a miner can show by clinical evidence (ordinarily X-ray evidence) that he is afflicted with complicated pneumoconiosis, the incurable and final stage of the disease, then the miner is deemed to be totally disabled under § 411 (c) (3).<sup>20</sup> Thus, Congress has mandated that

<sup>19</sup> For the full text of § 402 (f) see n. 9, *supra*.

<sup>20</sup> Section 411 (c) (3) provides:

"[I]f a miner is suffering or suffered from a chronic dust disease of the lung which (A) when diagnosed by chest roentgenogram, yields one or more large opacities (greater than one centimeter in diameter) and would be classified in category A, B, or C in the International Classification of Radiographs of the Pneumoconioses by the International Labor Organization, (B) when diagnosed by biopsy or autopsy, yields massive lesions in the lung, or (C) when diagnosis is made by other means, would be a condition which could reasonably be expected to yield results described in clause (A) or (B), then there shall be an irrebuttable presumption that he is totally disabled due to pneumoconiosis or that his death was due to pneumoconiosis or that at the time of his death he was totally disabled by pneu-



the final stage of the disease is always compensable if its existence can be shown by positive clinical evidence, and that any stage of the disease is compensable when physically disabling under the terms of § 402 (f). The Operators maintain that both of these standards are constitutionally untenable.

## (1)

The Operators contend that the definition of total disability set up in § 402 (f) is unconstitutionally arbitrary and irrational, because it provides for the compensation of former miners who might well be employable in other lines of work, and who therefore are not truly disabled by their mining-generated afflictions. We think it patent that this attack on § 402 (f) must fail. A miner disabled under § 402 (f) standards has suffered in at least two ways: his health is impaired, and he has been rendered unable to perform the kind of work to which he has adapted himself. Whether these interferences merit compensation is a public policy matter left primarily to the determination of the legislature. Cf. *Geduldig v. Aiello*, 417 U. S. 484 (1974). We cannot say that they are so insignificant as not to be a rational basis for compensation. Indeed, we long ago upheld against similar attack a workmen's compensation scheme providing benefits for injuries not depriving the employee of his ability to work. See *New York Central R. Co. v. Bianc*, 250 U. S. 596 (1919); cf. *Urie v. Thompson*, 337 U. S. 163, 181-187 (1949).

## (2)

The District Court, relying on such cases as *Stanley v. Illinois*, 405 U. S. 645 (1972), and *Vlandis v. Kline*, 412

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moconiosis, as the case may be." 30 U. S. C. § 921 (c) (3) (Supp. IV).



U. S. 441 (1973), invalidated § 411 (c)(3)'s "irrebuttable presumption" of total disability due to pneumoconiosis based on clinical evidence of complicated pneumoconiosis. The presumption, the Court explained,

"forecloses all fact finding as to the effect of that disease upon a particular coal miner . . . . To the extent that such presumption purports to making a finding of total disability in terms other than those provided by [§ 402 (f)] as standards for total disability, it is unreasonable and arbitrary. As written, section [411 (c)(3)] is violative of due process in precluding the opportunity to present evidence as to the effect of a chronic dust disease upon an individual in determining whether or not he is disabled." 385 F. Supp., at 429-430.

We think the District Court erred in equating this case with those in the mold of *Stanley* and *Vlandis*. Section 411 (c)(3) does not suffer from the flaw that has been present in our cases invalidating statutes as creating conclusive presumptions of fact.

As an operational matter, the effect of § 411 (c)(3)'s "irrebuttable presumption" of total disability is simply to establish entitlement in the case of a miner who is clinically diagnosable as extremely ill with pneumoconiosis arising out of coal mine employment.<sup>21</sup> Indeed, the

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<sup>21</sup> Although the premise of § 411 (c)(3), that the miner have a "chronic dust disease of the lung," does not explicitly provide that the disease must be one arising out of employment in a coal mine, it is clear under § 422 (a), and hence under § 415 (a) (5) as well, that an operator can be liable only for pneumoconiosis arising out of employment in a coal mine. Section 422 (a) provides that Part C liability "shall be applicable to each operator of a coal mine . . . with respect to death or total disability due to pneumoconiosis arising out of employment in such mine." 30 U. S. C. § 932 (a) (Supp IV).



disabilities to those who have profited from the fruits of their labor—the operators and the coal consumers. The Operators do not challenge Congress' power to impose the burden of past mine working conditions on the industry. They do claim, however, that the Act spreads costs in an arbitrary and irrational manner by basing liability upon past employment relationships, rather than taxing all coal mine operators presently in business. The Operators note that a coal mine operator whose work force has declined may be faced with a total liability that is disproportionate to the number of miners currently employed. And they argue that the liability scheme gives an unfair competitive advantage to new entrants into the industry, who are not saddled with the burden of compensation for inactive miners' disabilities. In essence the Operators contend that competitive forces will prevent them from effectively passing on to the consumer the costs of compensation for inactive miners' disabilities, and will unfairly leave the burden on the early operators alone.

Of course, as we have already indicated, a substantial portion of the burden for disabilities stemming from the period prior to enactment is born by the Federal Government. But even taking the Operators' argument at face value, it is for Congress to choose between imposing the burden of inactive miners' disabilities on all operators, including new entrants and farsighted early operators who might have taken steps to minimize black lung dangers, or to impose that liability solely on those early operators whose profits may have been increased at the expense of their employees' health. We are unwilling to assess the wisdom of Congress' chosen scheme by examining the degree to which the "cost-savings" enjoyed by operators in the pre-enactment period produced "excess" profits, or the degree to which the retrospective liability imposed

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U. S. 441 (1973), invalidated § 411 (c)(3)'s "irrebuttable presumption" of total disability due to pneumoconiosis based on clinical evidence of complicated pneumoconiosis. The presumption, the Court explained,

"forecloses all fact finding as to the effect of that disease upon a particular coal miner . . . . To the extent that such presumption purports to making a finding of total disability in terms other than those provided by [§ 402 (f)] as standards for total disability, it is unreasonable and arbitrary. As written, section [411 (c)(3)] is violative of due process in precluding the opportunity to present evidence as to the effect of a chronic dust disease upon an individual in determining whether or not he is disabled." 385 F. Supp., at 429-430.

We think the District Court erred in equating this case with those in the mold of *Stanley* and *Vlandis*. Section 411 (c)(3) does not suffer from the flaw that has been present in our cases invalidating statutes as creating conclusive presumptions of fact.

As an operational matter, the effect of § 411 (c)(3)'s "irrebuttable presumption" of total disability is simply to establish entitlement in the case of a miner who is clinically diagnosable as extremely ill with pneumoconiosis arising out of coal mine employment.<sup>21</sup> Indeed, the

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<sup>21</sup> Although the premise of § 411 (c)(3), that the miner have a "chronic dust disease of the lung," does not explicitly provide that the disease must be one arising out of employment in a coal mine, it is clear under § 422 (a), and hence under § 415 (a)(5) as well, that an operator can be liable only for pneumoconiosis arising out of employment in a coal mine. Section 422 (a) provides that Part C liability "shall be applicable to each operator of a coal mine . . . with respect to death or total disability due to pneumoconiosis arising out of employment in such mine." 30 U. S. C. § 932 (a) (Supp IV).



legislative history discloses that it was precisely this advanced and progressive stage of the disease that Congress sought most certainly to compensate.<sup>22</sup> Were the Act phrased simply and directly to provide that operators were bound to provide benefits for all miners clinically demonstrating their affliction with complicated pneumoconiosis arising out of employment in the mines, we think it clear that there could be no due process objection to it. For, as we have already observed, destruction of earning capacity is not the sole legitimate basis for compulsory compensation of employees by their employers. *New York Central R. Co. v. Bianc*, 250 U. S. 596 (1919). We cannot say that it would be irrational for Congress to conclude that impairment of health alone warrants compensation. Since Congress can clearly draft a statute to accomplish precisely what it has accomplished through § 411 (c)(3)'s presumption of disability, the argument is essentially that Congress has accomplished its result in an impermissible manner—by defining eligibility in terms of “total disability” and erecting an “irrebuttable presumption” of total disability upon a factual showing that does not necessarily satisfy the statutory definition of total disability. But in a statute such as this, regulat-

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<sup>22</sup> The original House and Senate Bills that gave rise to the Conference Bill enacted as Title IV of the Federal Coal Mine Health and Safety Act of 1969 each provided for compensation only for complicated pneumoconiosis. H. R. 13950, 91st Cong., 1st Sess. §§ 112 (b)(1), (7)(B), as it passed the House, 115 Cong. Rec. 32061 (Oct. 29, 1969), contained the diagnostic criteria presently embodied in § 411 (c)(3), and deemed complicated pneumoconiosis to be “totally disabling” and compensable. S. 2917, 91st Cong., 1st Sess. §§ 501-504, as amended on the floor, 115 Cong. Rec. 27632 (Sept. 30, 1969), and passed, 115 Cong. Rec. 28243 (Oct. 2, 1969), established a program of interim benefits for total disability due to complicated pneumoconiosis, and directed the Secretary of Health, Education, and Welfare to develop standards for determining total disability due to complicated pneumoconiosis.



ing purely economic matters, we do not think that Congress' choice of statutory language can invalidate the enactment when its operation and effect are clearly permissible. Cf. *McDonald v. Board of Elections*, 394 U. S. 802, 809 (1969); *United States v. Carolene Products Co.*, 304 U. S. 144, 154 (1938).

This focus on the operative effect of the legislation, rather than its particular phrasing, is consistent with our modern cases employing "irrebuttable presumption" terminology. E. g., *Cleveland Board of Education v. LaFleur*, 414 U. S. 632 (1974); *Vlandis v. Kline*, 412 U. S. 441 (1973); *Stanley v. Illinois*, 405 U. S. 645 (1972). In none of these cases did the statute in question explicitly create an irrebuttable presumption. The Court's focus in each case was on the operation of the statute, not its phrasing, and no functionally identical reupholstering of the statute would have saved it.<sup>23</sup> In each case the fatal flaw was not simply that the statute in effect created an irrebuttable presumption, but that the criteria that gave rise to the so-called irrebuttable presumption did not pass muster under the appropriate standard of review. Since the criteria giving rise to § 411 (c)(3)'s presumption of total disability provide a permissible basis for compensation under the standard of rationality applicable to this legislation, we cannot say that it is unconstitutional merely on account of the form of words.

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<sup>23</sup> *Schlesinger v. Wisconsin*, 270 U. S. 230 (1926), also relied upon by the Operators, is no different in substance. The enactment invalidated in that case, levying an estate tax upon gifts made within six years of death, was statutorily framed as a conclusive presumption that such gifts were made in contemplation of death and therefore taxable. But the decision did not rest solely upon the statutory framing. Rather, the Court made clear that, however drawn, the statute could not, consistent with prevailing views of the Fourteenth Amendment, have applied the tax to gifts solely on the ground that they were made within six years of death. See also *Heiner v. Donnan*, 285 U. S. 312, 329 (1932).



## (3)

In addition to creating an irrebuttable presumption of total disability, § 411 (c)(3) provides that clinical evidence of a miner's complicated pneumoconiosis gives rise to an irrebuttable presumption that he was totally disabled by pneumoconiosis at the time of his death, and that his death was due to pneumoconiosis. The effect of these presumptions, in particular the presumption of death due to pneumoconiosis, is to grant benefits to the survivors of any miner who during his lifetime had complicated pneumoconiosis arising out of employment in the mines, regardless of whether the miner's death was caused by pneumoconiosis. The Operators raise no separate challenge to these presumptions, and we would have no occasion to comment separately on them were it not for the Operators' general complaint against the application of the Act to employees who terminated their employment before the Act was passed. To the extent that the presumption of death due to pneumoconiosis is viewed as requiring compensation for damages resulting from death unrelated to the operator's conduct, its application to employees who terminated their employment before the Act was passed would present difficulties not encountered in our prior discussion of retroactivity. The justification we found for the retrospective application of the Act is that it serves to spread costs in a rational manner—by allocating to the operator an actual cost of his business, the avoidance of which might be thought to have enlarged the operator's profits. The damage resulting from a miner's death that is due to causes other than the operator's conduct can hardly be termed a "cost" of the operator's business.

We think it clear, however, that the benefits authorized by § 411 (c)(3)'s presumption of death due to pneumoconiosis were intended not simply as compensation for damages due to the miner's *death*, but as deferred com-



pensation for injury suffered during the miner's lifetime as a result of his illness itself. Thus, the Senate Report accompanying the 1972 amendments makes clear Congress' purpose to award benefits not only to widows whose husbands "[gave] their lives," but also to widows whose husbands "gave their health . . . in the service of the nation's critical coal needs."<sup>24</sup>

In the case of a miner who died with, but not from, pneumoconiosis *before* the Act was passed, the benefits serve as deferred compensation for the suffering endured by his dependents by virtue of his illness. And in the case of a miner who died with, but not from, pneumoconiosis *after* the Act was passed, the benefits serve an additional purpose: the miner's knowledge that his dependent survivors would receive benefits serves to compensate him for the suffering he endures. In short, § 411 (c)(3)'s presumption of death due to pneumoconiosis authorizes compensation for injury attributable to the operator's business, and viewed as such it poses no retroactivity problems distinct from those considered in our prior discussion.

It might be suggested that the payment of benefits to dependent survivors is irrational as a scheme of compensation for injury suffered as a result of a miner's disability. But we cannot say that the scheme is wholly unreasonable in providing benefits for those who were most likely to have shared the miner's suffering. Nor can we say that the scheme is arbitrary simply because it spreads the payment of benefits over a period of time.<sup>25</sup>

<sup>24</sup> S. Rep. No. 743, 92d Cong., 2d Sess., at 8 (1972)

<sup>25</sup> Under the present scheme, the payment of monthly benefits is not without limit. Section 422 (e) quite clearly provides that "[n]o payment of benefits shall be required under this section . . . (2) for any period prior to January 1, 1974; or (3) for any period after twelve years after December 30, 1969." 30 U. S. C. § 932 (e) (Supp. IV). This time limitation, applicable in Part C cases by its terms,



We might face a more difficult problem in applying § 411 (c)(3)'s presumption of death due to pneumoconiosis on a retrospective basis if the presumption authorized benefits to the survivors of a miner who did not die from pneumoconiosis, and who during his life was completely unaware of and unaffected by his illness; or, in the case of a miner who died before the Act was passed, if the presumption authorized benefits to the survivors of a miner who did not die from pneumoconiosis, who nevertheless was aware of and affected by his illness, but whose dependents were completely unaware of and unaffected by his illness. But the Operators in their facial attack on the Act have not suggested that a miner whose condition was serious enough to activate the § 411 (c)(3) presumptions might not have been affected in any way by his condition, or that the family of such a miner might not have noticed it. Under the circumstances, we decline to engage in speculation as to whether such cases may arise.<sup>26</sup>

## B

Turning our attention to the statutory regulations of proof of § 402 (f) disability, we focus initially on the

is also applicable to transition period cases by virtue of § 415 (a) (5), 30 U. S. C. § 925 (a) (5) (Supp. IV). Thus, the operator is liable for monthly payments only for a period of eight years. The total amount payable to a single dependent survivor during this period, under current rates, is approximately \$18,900. The maximum amount for which the operator would be liable, if the miner had four or more dependent survivors, is approximately \$37,800. See n. 8, *supra*.

<sup>26</sup> Our analysis of the retrospective application of the § 411 (c)(3) presumption of death due to pneumoconiosis is, of course, fully applicable to the retrospective application of any other provisions that might be construed to authorize benefits in the case of miners who die with, but not from, totally disabling pneumoconiosis. See §§ 422 (a), (c); 412 (a), (2), (3), (5); 411 (a), 30 U. S. C. §§ 932 (a), (c); 922 (a), (2), (3), (5); 921 (a) (1970 ed. and Supp. IV).



Operators' challenge to the presumptions contained in §§ 411 (c)(1) and (2). Section 411 (c)(1) provides that a coal miner with 10 years' employment in the mines who suffers from pneumoconiosis will be presumed to have contracted the disease from his employment.<sup>27</sup> Section 411 (c)(2) provides that if a coal miner with 10 years' employment in the mines dies from a respirable disease, his death will be presumed to have been due to pneumoconiosis.<sup>28</sup> Each presumption is explicitly rebuttable, and the effect of each is simply to shift the burden of going forward with evidence from the claimant to the operator. See Fed. Rule Evid. 301.

We have consistently tested presumptions arising in civil statutes such as this, involving matters of economic regulation, against the standard articulated in *Mobile, Jackson and Kansas City R. Co. v. Turnipseed*:

"That a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law or a denial of the equal protection of the law it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate." 219 U. S. 35, 43 (1910).

<sup>27</sup> Section 411 (c)(1), as amended, provides in full:

"[I]f a miner who is suffering or suffered from pneumoconiosis was employed for ten years or more in one or more coal mines there shall be a rebuttable presumption that his pneumoconiosis arose out of such employment." 30 U. S. C. § 921 (c)(1) (Supp. IV).

<sup>28</sup> Section 411 (c)(2), as amended, provides in full:

"[I]f a deceased miner was employed for ten years or more in one or more coal mines and died from a respirable disease there shall be a rebuttable presumption that his death was due to pneumoconiosis," 30 U. S. C. § 921 (c)(2) (Supp. IV).



See *Atlantic Coast Line R. Co. v. Ford*, 287 U. S. 502 (1933); *Bandini Petroleum Co. v. Superior Court*, 284 U. S. 8, 19 (1931). See also *Leary v. United States*, 395 U. S. 6, 29-53 (1969); *Tot v. United States*, 319 U. S. 463, 467-468 (1943). Moreover, as we have recognized:

"The process of making the determination of rationality is, by its nature, highly empirical, and in matters not within specialized judicial competence or completely commonplace, significant weight should be accorded the capacity of Congress to amass the stuff of actual experience and cull conclusions from it." *United States v. Gainey*, 380 U. S. 63, 67 (1965).

Judged by these standards, the presumptions contained in §§ 411 (c)(1) and (2) are constitutionally valid. The Operators focus their attack on the rationality of the presumptions' bases in duration of employment. But it is agreed here that pneumoconiosis is caused by breathing coal dust, and that the likelihood of a miner's developing the disease rests upon both the concentration of dust to which he was exposed and the duration of his exposure. Against this scientific background, it was not beyond Congress' authority to refer to exposure factors in establishing a presumption that throws the burden of going forward on the operators. And in view of the medical evidence before Congress indicating the noticeable incidence of pneumoconiosis in cases of miners with 10 years' employment in the mines,<sup>29</sup> we cannot say that it was "purely arbitrary" for Congress to select the 10-year figure as a point of reference for these presumptions. No greater mathematical precision is required. Cf.

<sup>29</sup> See, e. g., Hearings on S. 355, before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 91st Cong., 1st Sess., Part 2, p. 699 (Testimony of Dr. Werner A. Laqueur).



*Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61, 78 (1911).

The Operators insist, however, that the 10-year presumptions are arbitrary, because they fail to account for varying degrees of exposure, some of which would pose lesser dangers than others. We reject this contention. In providing for a shifting of the burden of going forward to the operators, Congress was no more constrained to require a preliminary showing of the degree of dust concentration to which a miner was exposed, an historical fact difficult for the miner to prove, than it was to require a preliminary showing with respect to all other factors that might bear on the danger of infection. It is worth repeating that mine employment for 10 years does not serve by itself to activate any presumption of pneumoconiosis; it simply serves along with proof of pneumoconiosis under § 411 (c)(1) to presumptively establish a cause of pneumoconiosis, and along with proof of death from a respirable disease under § 411 (c)(2) to presumptively establish that death was due to pneumoconiosis. In its "rough accommodations," *Metropolis Theatre Co. v. City of Chicago*, 228 U. S. 61, 69 (1913), Congress was surely entitled to select duration of employment, to the exclusion of the degree of dust exposure and other relevant factors, as signalling the point at which the operator must come forward with evidence of the cause of pneumoconiosis or death, as the case may be. We certainly cannot say that the presumptions, by excluding other relevant factors, operate in a "purely arbitrary" manner. *Mobile, Jackson and Kansas City R. Co. v. Turnipseed*, 219 U. S. 35, 43 (1910).

The Operators press the same due process attack upon the durational basis of the rebuttable presumption in § 411 (c)(4), which provides, *inter alia*, that a miner em-



ployed for 15 years in underground mines, who is able to marshal evidence demonstrating a totally disabling respiratory or pulmonary impairment, shall be rebuttably presumed to be totally disabled by pneumoconiosis.<sup>30</sup> Particularly in light of the Surgeon General's testimony at the Senate Hearings on the 1969 Act to the effect that the 15-year point marks the beginning of linear increase in the prevalence of the disease with years spent underground,<sup>31</sup> we think it clear that the durational basis of this presumption is equally unassailable.

## C

The Operators also challenge § 413 (b) of the Act, which provides that "no claim for benefits . . . shall be

<sup>30</sup> Section 411 (c) (4), as amended, provides in full:

"[I]f a miner was employed for fifteen years or more in one or more underground coal mines, and if there is a chest roentgenogram submitted in connection with such miner's, his widow's, his child's, his parent's, his brother's, his sister's, or his dependent's claim under this subchapter and it is interpreted as negative with respect to the requirements of paragraph (3) of this subsection, and if other evidence demonstrates the existence of a totally disabling respiratory or pulmonary impairment, then there shall be a rebuttable presumption that such miner is totally disabled due to pneumoconiosis, that his death was due to pneumoconiosis, or that at the time of his death he was totally disabled by pneumoconiosis. In the case of a living miner, a wife's affidavit may not be used by itself to establish the presumption. The Secretary shall not apply all or a portion of the requirement of this paragraph that the miner work in an underground mine where he determines that conditions of a miner's employment in a coal mine other than an underground mine were substantially similar to conditions in an underground mine. The Secretary may rebut such presumption only by establishing that (A) such miner does not, or did not, have pneumoconiosis, or that (B) his respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine." 30 U. S. C. § 921(c) (4) (Supp. IV).

<sup>31</sup> See S. Rep. No. 743, 92d Cong., 2d Sess., at 13 (1972).



denied solely on the basis of a chest roentgenogram [X-ray].”<sup>32</sup> Congress, of course, has plenary authority over the promulgation of evidentiary rules for the federal courts. See, e. g., *Hawkins v. United States*, 358 U. S. 74, 78 (1958); *Tot v. United States*, 319 U. S. 463, 467 (1943); cf. *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61, 81 (1911). The Operators contend, however, that § 413 (b) denies them due process because X-ray evidence is frequently the sole evidence they can marshal to rebut a claim of pneumoconiosis.<sup>33</sup> We conclude that, given Congress’ reasoned reservations regarding the reliability of negative X-ray evidence, it was entitled to preclude exclusive reliance on such evidence.

Congress was presented with significant evidence demonstrating that X-ray testing that fails to disclose pneumoconiosis cannot be depended upon as a trustworthy indicator of the absence of the disease.<sup>34</sup> In particular, the findings of the Surgeon General and others indicated that although X-ray evidence was generally the most important diagnostic tool in identifying the presence or absence of pneumoconiosis, when considered alone it was not a wholly reliable indicator of the *absence* of the disease; that autopsy frequently disclosed pneumo-

<sup>32</sup> See n. 12, *supra*.

<sup>33</sup> The Operators frame their argument by saying that the effect of § 413 (b) is to render the rebuttable presumptions of § 411 (c) effectively irrebuttable. But this dressing adds nothing. Once it is determined that the limitation on X-ray evidence is permissible generally, it is irrelevant that the burden of going forward with some rebuttal evidence is thrown upon the operator by a permissible presumption rather than by the claimant’s affirmative factual showing.

<sup>34</sup> Our attention has not been directed to any authoritative indications that X-ray evidence of the *presence* of pneumoconiosis is untrustworthy.



coniosis where X-ray evidence had disclosed none;<sup>35</sup> and that pneumoconiosis may be masked from X-ray detection by other disease.<sup>36</sup>

Taking these indications of the unreliability of negative X-ray diagnosis at face value, Congress was faced with the problem of determining which side should bear the burden of the unreliability. On the one hand, preclusion of any reliance on negative X-ray evidence would risk the success of some nonmeritorious claims; on the other hand, reliance on uncorroborated negative X-ray evidence would risk the denial of benefits in a significant number of meritorious cases. Congress addressed the problem by adopting a rule which, while preserving some of the utility, avoided the worst dangers of X-ray evidence. Section 413 (b) does not make negative X-ray evidence inadmissible, or ineligible to be considered as ultimately persuasive evidence when taken together with other factors—for example, a low level of coal dust concentration in the Operator's mine, a relatively short duration of exposure to coal dust, or the likelihood that the miner is disabled by some other cause.<sup>37</sup> The prohibition

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<sup>35</sup> Evidence was produced at the Senate hearings showing that in one study

"approximately 25 percent of a random sample of some 200 coal miners whose medical records based upon X-ray findings showed no coal-worker's pneumoconiosis were found on post-mortem examination to have the disease." S. Rep. No. 743, 92d Cong., 2d Sess., at 12 (1972).

<sup>36</sup> *Id.*, at 9-16; H. R. Rep. No. 460, 92d Cong., 1st Sess., at 8-10 (1971).

<sup>37</sup> Section 413 (b) directs additionally that

"In determining the validity of claims under this part, all relevant evidence shall be considered, including, where relevant, medical tests such as blood gas studies, X-ray examination, electrocardiogram, pulmonary function studies, or physical performance tests, and any medical history, evidence submitted by the claimant's physician, or his wife's affidavits, and in the case of a deceased miner, other



is only against sole reliance upon negative X-ray evidence in rejecting a claim.

The Operators attack the limitation on the use of negative X-ray evidence by suggesting that Congress' conclusion as to the unreliability of negative X-ray evidence is constitutionally unsupportable. Relying on other evidence submitted to Congress in 1972,<sup>38</sup> the Operators contend that the consensus of medical judgment on the question is that good quality X-ray evidence does reliably indicate the presence or absence of pneumoconiosis. In essence, the Operators seek a judicial reconsideration of the judgment of Congress on this issue. But the reliability of negative X-ray evidence was debated forcefully on both sides before the Congress, and the Operators here suggest nothing new to add to the debate; they are simply dissatisfied with Congress' conclusion. As we have recognized in the past, however, when it comes to evidentiary rules in matters "not within specialized judicial competence or completely commonplace," it is primarily for Congress "to amass the stuff of actual experience and cull conclusions from it." *United States v. Gainey*, 380 U. S. 63, 67 (1965). It is sufficient that the evidence before Congress showed doubts about the reliability of negative X-ray evidence. That Congress ultimately determined "to resolve doubts in favor of the disabled miner"<sup>39</sup> does not render the enactment arbi-

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appropriate affidavits of persons with knowledge of the miner's physical condition, and other supportive materials." 30 U. S. C. § 923 (b) (Supp. IV).

<sup>38</sup> This evidence was brought to the Hearings by the Social Security Administration, whose rules the § 413 (b) limitation was designed to overrule, and was credited by the minority of the House Committee on Education and Labor. H. R. Rep. No. 460, 92d Cong., 1st Sess., at 22, 29-30 (1971).

<sup>39</sup> S. Rep. No. 743, 92d Cong., 2d Sess., at 11 (1972).



trary under the standard of rationality appropriate to this legislation.

## D

Finally, the Operators challenge the limitation on rebuttal evidence contained in § 411 (c)(4). That section, as we have indicated, provides that a miner employed for 15 years in underground mines who is able to demonstrate a totally disabling respiratory or pulmonary impairment shall be rebuttably presumed to be totally disabled by pneumoconiosis, and his death shall be rebuttably presumed to be due to pneumoconiosis. The final sentence of § 411 (c)(4) provides that

“[t]he Secretary may rebut [the presumption provided herein] only by establishing that (A) such miner does not, or did not, have pneumoconiosis, or that (B) his respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine.”

The effect of this limitation on rebuttal evidence is, *inter alia*, to grant benefits to any miner with 15 years' employment in the mines, if he is totally disabled by some respiratory or pulmonary impairment arising in connection with his employment, and has a case of pneumoconiosis. The Operators contend that this limitation erects an impermissible irrebuttable presumption, because it establishes liability even though it might be medically demonstrable in an individual case that the miner's pneumoconiosis was mild and did not cause the disability—that the disability was wholly a product of other disease, such as tuberculosis or emphysema. Disability due to these diseases, as the Operators note, is not otherwise compensable under the Act.

The District Court, concluding that the quoted limitation on rebuttal evidence applied against an operator in



a § 415 transition period case, and recognizing that pneumoconiosis is not inherently disabling in the § 402 (f) sense, judged this limitation unconstitutional on the ground that it deprived an operator of a factual defense—that the miner is not “totally disabled” due to pneumoconiosis under § 402 (f). Additionally, reading the second part of the § 411 (c)(4) limitation on rebuttal to preclude an operator’s defense that the disease did not arise out of employment in the particular mines for which it was responsible, the District Court found this aspect of § 411 (c)(4) unconstitutional as well.

The Federal Parties urge on their cross-appeal that these constitutional judgments are erroneous. We need not inquire into the constitutional questions raised by the District Court, however, because we think it clear as a matter of statutory construction that the § 411 (c)(4) limitation on rebuttal evidence is inapplicable to operators. By the language of § 411 (c)(4), the limitation applies only to “the Secretary” and not to an operator seeking to avoid liability under § 415 or § 422. And this plain language is fortified by the legislative history. The Senate Report on § 411 (c)(4) specifically states that the limitation on rebuttal applies to the Secretary of Health, Education, and Welfare, but nowhere suggests that it binds on operator.<sup>40</sup>

While apparently recognizing that the § 411 (c)(4) limitation on rebuttal evidence could not apply against an operator in a Part C determination, the District Court believed that the limitation bound an operator in the determination of a claim filed during the § 415 transition

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<sup>40</sup> S. Rep. No. 743, 92d Cong., 2d Sess., at 12 (1972). Similarly, the Conference Report refers to the limitation only as running against “the Secretary.” S. Rep. No. 780, 92d Cong., 2d Sess., at 8 (1972); H. R. Rep. No. 1048, 92d Cong., 2d Sess., at 8 (1972).



period, "[s]ince under section [415] the operator is bound by the Secretary's finding of liability under Part B." 385 F. Supp., at 430. In so concluding, the District Court was in error. First, it would appear, again from the plain language of the statute, that the reference to "the Secretary" in § 411 (c)(4) does not refer to the Secretary of Labor. On the contrary, § 402 (c), 30 U. S. C. § 902 (c) (1970 ed.), quite plainly defines "Secretary" when used in Part B, including § 411, as meaning the Secretary of Health, Education, and Welfare, not the Secretary of Labor. The Senate Report referred to above confirms this conclusion. Even assuming, however, that the § 411 (c)(4) limitation on rebuttal by "the Secretary" may be taken to bind the Secretary of Labor insofar as he was required to *pay* benefits for which the United States was liable during the transition period, § 415 (a)(1), we have found nothing in the statute or in its legislative history to suggest that an operator is similarly bound because the Secretary of Labor is also to *adjudicate* the operator's liability. § 415 (a)(5). Indeed, such a reading would render a mine operator bound by the rebuttal limitation in § 415 transition period cases, although not so bound in cases filed thereafter under Part C. And that result would be contrary to the language of § 415 (a)(5), which prescribes that an Operator "shall be bound by the determination of the Secretary of Labor [on a § 415 transition period claim] as if the claim had been filed pursuant to Part C."

In short, we conclude that the Act does not itself limit the evidence with which an operator may rebut the § 411 (c)(4) presumption. Accordingly, we vacate the order of the District Court declaring the § 411 (c)(4) limitation on rebuttal evidence unconstitutional and enjoining the Secretary of Labor from limiting evidence in rebuttal to the § 411 (c)(4) presumption. Cf. *Van Lare*



34      USERY v. TURNER ELKHORN MINING CO.

v. *Hurley*, 421 U. S. 338, 344 (1975); *United States v. Munsingwear, Inc.*, 340 U. S. 36 (1950).

We are aware that regulations promulgated in 1972 by the Secretary of Health, Education, and Welfare under its § 411 (b) authorization, 20 CFR §§ 410.414, 410.454 (1975), applicable to Part C determinations under § 422 (h), and expressly adopted in 1973 by the Secretary of Labor, 20 CFR § 718 (1975), authorize limitations on rebuttal evidence similar to those contained in § 411 (c) (4), and appear to apply in determinations of an operator's liability. But the Operators' amended complaint never challenged the statutory or constitutional validity of these regulations.<sup>41</sup> Particularly in the absence of any mention of the regulations in the opinion and judgment of the District Court, or in the briefs and oral arguments of the parties, we find it inappropriate to consider their statutory or constitutional validity at this stage.<sup>42</sup>

## VI

In sum, the challenged provisions, as construed, are constitutionally sound against the Operators' facial at-

<sup>41</sup> It follows from our discussion of the § 411 (c) (4) limitation on rebuttal that these regulations cannot stand as authoritative administrative interpretations of the statute itself. But the role of regulations is not merely interpretative; they may instead be designedly creative in a substantive sense, if so authorized. See, e. g., *Mourning v. Family Publications Service, Inc.*, 411 U. S. 356 (1973). If the regulations promulgated here are to be upheld, it must be in this latter sense.

<sup>42</sup> We see no reason to remand the case to the three-judge District Court for the purpose of determining whether the Operators should be granted leave to amend their complaint to include a statutory and constitutional challenge to the regulations. The three-judge court remanded to a single judge all questions regarding the validity of regulations challenged in the Operators' complaint, and that portion of the case is pending before a single judge. Any motion for leave to amend the complaint to include a challenge to any additional regulations can be addressed to that single judge.



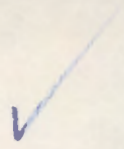
tack. The judgment of the District Court as appealed from in No. 74-1316 is affirmed. The judgment of the District Court as appealed from in No. 74-1302 is reversed, except insofar as it declares unconstitutional, and enjoins the operation of, the limitation on rebuttal evidence contained in § 411 (c)(4) of the Act. In this latter respect, the judgment in No. 74-1302 is vacated, and the case remanded with directions to dismiss.

*It is so ordered.*

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

April 2, 1976



RE: Nos. 74-1302 and 74-1316 W.J. Usery v. Turner Elkhorn  
Mining Company, et al.

Dear Thurgood:

I agree.

Sincerely,

A handwritten signature in cursive script, appearing to read "Bul", is written below the word "Sincerely,".

Mr. Justice Marshall

cc: The Conference



CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

April 7, 1976

FILE COPY  
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No. 74-1302 and 74-1316 Usery v. Turner,  
Elkhorn Mining Co., etc.

Dear Thurgood:

In due time I will circulate a dissent to Part IV of your opinion for the Court. This is the portion of your opinion that sustains provisions of the Act that compel mine operators to compensate former employees, and the survivors of such employees, who terminated their employment before the Act was passed.

My present disposition is to join Part V of your opinion, in which you sustain the presumptions and evidentiary rules.

Sincerely,

*Lewis*

Mr. Justice Marshall

lfp/ss

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

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Supreme Court of the United States  
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CHAMBERS OF  
JUSTICE BYRON R. WHITE

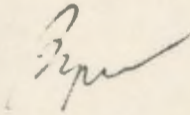
April 9, 1976

Re: Nos. 74-1302 & 74-1316 - Usery v. Turner  
Elkhorn Mining Co.

Dear Thurgood:

Please join me.

Sincerely,



Mr. Justice Marshall

Copies to Conference

CHAMBERS DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 74-1302 AND 74-1316

W. J. Usery, Jr., Secretary  
of the United States De-  
partment of Labor,  
et al., Appellants,  
74-1302 v.

Turner Elkhorn Mining  
Company et al.

Turner Elkhorn Mining  
Company et al.,  
Appellants,  
74-1316 v.

W. J. Usery, Jr., Secretary  
of the United States De-  
partment of Labor,  
et al.

On Appeals from the United  
States District Court for  
the Eastern District of  
Kentucky.

[May —, 1976]

MR. JUSTICE POWELL.

Appellants in No. 74-1316, the Operators, challenge as unconstitutional the retroactive obligations imposed on them by the Federal Coal Mine Health and Safety Act of 1969, 83 Stat. 792, as amended by the Black Lung Benefits Act of 1972, 86 Stat. 150, 30 U. S. C. § 901 *et seq.* (Act). The Court rejects their contention in Part IV of its opinion. I dissent from Part IV, but concur in other portions of the opinion not inconsistent with the views herein expressed.

I

Coal miner's pneumoconiosis was not recognized in the United States until the 1950's, and there was no federal



## 2 USERY v. TURNER ELKHORN MINING CO.

legislation providing benefits to its victims until the enactment of this statute in 1969. In Title IV of the Act, Congress significantly redefined the respective rights and obligations of miners and their employers in regard to this disease by establishing a benefits scheme to compensate victims of pneumoconiosis.<sup>1</sup> Under Title IV miners who filed claims before July 1, 1973, are to collect benefits from the Federal Government, §§ 411-414, 30 U. S. C. §§ 921-924.<sup>2</sup> Miners filing claims after June 30, 1973, are to collect benefits until 1981, see *ante*, at 22-23, from their individual employers. § 415, 421-431, 30 U. S. C. §§ 925, 931-941.<sup>3</sup> Under the statute, the class of claimants to which individual employers are liable includes both (i) miners employed at the time of or after enactment and (ii) miners no longer employed in the industry at the time of enactment ("former miners").

The unprecedented feature of the Act is that miners may be eligible for benefits from particular coal-mining concerns even if the disability upon which the claims are based developed before enactment of the law, and even if the miner was no longer employed in the industry at the time of enactment. The Department of Labor already has made initial determinations of liability

<sup>1</sup> Title II of the Act prescribes the maintenance of less hazardous mine conditions in the future. § 201 *et seq.*, 30 U. S. C. § 841 *et seq.*

<sup>2</sup> As does the Court, I simplify by not distinguishing between claims by employees and claims by their survivors. See *ante*, at 10 n. 13.

<sup>3</sup> Claims filed between July 1, 1973, and December 31, 1973, were to be paid by the Federal Government until January 1, 1974, when they became the responsibility of individual mining concerns. § 415, 30 U. S. C. § 925. Liability on the part of individual mining concerns arises only if the claimant does not have recourse to an applicable state workmen's compensation program approved by the Secretary of Labor, §§ 421-422, 30 U. S. C. §§ 931-932, but no such state programs have been approved. See *ante*, at 4-5.



against one of the Operators and in favor of claimants whose employment terminated decades ago.<sup>4</sup>

## II

The Operators do not challenge their liability to miners employed at the time of or after enactment, which embodies familiar principles of workmen's compensation.<sup>5</sup>

The Operators contend, however, that their statutory liability to former miners has been imposed in violation of the Fifth Amendment guarantee against arbitrary, irrational, or discriminatory legislation, see, e. g., *Richardson v. Belcher*, 404 U. S. 78, 81 (1971), as there is no rational justification for imposing liability to former miners upon individual mine owners (and thereby competitively disadvantaging them *vis-à-vis* mining concerns not so burdened.

Congress might have chosen to compensate the former miners in question by any of a number of means. It might, for example, have made the Federal Government liable for all claims by former miners, not simply those filed before July 1, 1973. It also might have required the entire coal industry to contribute to a general fund from which benefits would be paid. But Congress chose to require individual employers to pay benefits to their former employees. The legislative purpose is both legiti-

<sup>4</sup> Favorable initial determinations have been made for claimants who left mine work in 1920, 1923, 1927, 1931, 1932, 1937, 1943, 1946, and 1948. Brief for Operators, 30 n. 1. These determinations rebut the Government's suggestion that in combination the initial period of federal liability and the statute of limitations specified in § 422 (f) (1), 30 U. S. C. § 932 (f) (1), ordinarily will prevent employer liability for disabilities maturing before passage of the Act. See *ante*, at 11-12, n. 14.

<sup>5</sup> The analogy to workmen's compensation principles is especially obvious in light of the express statutory role for state workmen's compensation programs. See n. 2, *supra*.

in the industry?  
or by the  
employee  
hit with the  
claim?

dangling  
modifier ☺

who no longer  
employ them

are these with  
regard to claims  
against employers,  
I presume?



mate and laudable. The question is whether the means chosen to achieve the purpose bear "a fair and substantial relation" to that purpose. *Royster Guano Co. v. Virginia*, 253 U. S. 412, 415 (1920).

Congress, of course, had broad discretion in choosing among possible means. *E. g.*, *Richardson, supra*; cf. *Williamson v. Lee Optical*, 348 U. S. 483 (1954). The Constitution does not require—certainly with respect to legislation on economic matters—adoption of means most compatible with sound economics or even fairness. But the means adopted must be rational, and in this case the evaluation of rationality must take into account the retroactivity of the challenged liability. As the Court puts it:

"The retrospective aspects of the legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former. Thus, in this case the justification for the retrospective imposition of liability must take into account the possibilities that the Operators may not have known of the danger of their employees' contracting pneumoconiosis, and that even if they did know of the danger their conduct may have been taken in reliance upon the current state of the law . . . ." *Ante*, at 13.

→ aren't you talking about equal protection?

The Court purports to recognize that the question of the rationality of the individual Operators' liability to former miners is a troublesome one, see *ante*, at 13-14, but it nonetheless sustains the challenged provisions. In my view, the Court errs in doing so.

#### A

The imposition of liability upon some individual employers but not others might be rational if those burdened could be viewed as being culpable, in some sense,



for the harm done to the former miners. Congress, however, was not of the view that the Operators were individually culpable for conducting their businesses in a then lawful way and at a time when the dangers of pneumoconiosis were not fully realized.<sup>6</sup> And the Court acknowledges today that the Operators' liability cannot be rationalized "on any theory of . . . blameworthiness." *Ante*, at 13. The purported justification thus must lie elsewhere.

## B

The Court justifies Congress' choice of means as follows:

"We find . . . that the imposition of liability for the effects of disabilities bred in the past is justified as a rational measure to spread the cost of the employees' disabilities to those who have profited from the fruits of their labor—the operators and the coal consumers." *Id.*, at 13-14.

The Court thus relies solely on one of the traditional justifications given for workmen's compensation laws.<sup>7</sup>

The Operators concede that the ~~ability to spread costs~~

<sup>6</sup> Even Senator Javits, who played a significant role in the development of individual-employer liability, see Brief for Operators, at 34, thought that the "blame" for past neglect must be shared by "all of us," including "the industry, the medical profession, and the Government—particularly the Public Health Service." House Comm. on Education and Labor, Legislative History/Federal Coal Mine Health and Safety Act, 338 (Comm. Print 1970) (floor remarks).

<sup>7</sup> Another traditional justification for workmen's compensation laws is that they provide an incentive for employers to maintain safe working conditions. The Report of the National Commission on State Workmen's Compensation Laws, 38-39, 87 (1972). This justification is not relevant to the Operators' retrospective liability, as the Court recognizes. *Ante*, at 13.

*Murgia problem:  
where does this  
purpose come  
from? Was it  
made up in  
course of  
litigation?*

*goal of?*



makes rational their prospective liability to active and future miners.

this quote focuses only on passing costs on to consumers - sees employers as bearing costs only in order to pass through. It's a concession but an incomplete one.

"The philosophy underlying workmen's compensation laws is that economic losses suffered by workers as a result of disabling disease and injury incurred in connection with their labor should be borne by the consumers of the products whose production was the occasion for their losses. Workmen's compensation laws achieve this result by transferring the loss from the worker to his employer, who is better capable of passing the loss on to consumers through the price of the product, along with his other costs of production." Brief for Operators, 35-36.

In prospective operation, ~~the industry as a whole can spread the costs of pneumoconiosis to those who benefit from the miners' labor, and any competitive disadvan-~~ But the Act's retroactive liability arises after it is too late to take preventive safety measures, and the Operators emphasize that such liability ~~on an individualized basis~~ arises after it is too late ~~to spread costs—especially~~ in light of the history and economics of the coal industry. Individual firms burdened with compensation payments therefore are discriminated against despite the lack of a rational relationship to Congress' purpose in enacting the Act.

Cursory examination of the industry reveals the force of the Operators' argument. A notable fact about coal mining is that the industry currently employs approximately 150,000 persons, whereas in 1939 it employed nearly 450,000. Brief for Operators 24. The reduced scale of the coal industry and the liability to survivors, as well as to former miners, means that retroactive obligations threaten to be disproportionate to the scale of

the statute spreads the costs of pneumoconiosis to those within the industry as a whole

for individual miners

but costs are still spread to the owners. This is some mistake as made in above quote

for individual owners



current operations.<sup>8</sup> In itself this might not prevent the cost-spreading function relied upon by the Court to justify employers' individual liability. But liability to former miners is, of course, not randomly disturbed across the industry. Rather, it is dictated by historical patterns that are unrelated to the present contours of the industry. Two examples are illustrative: (i) Some coal-mining concerns have been in the mining business for decades, while competitors have commenced operation more recently. The exposure of the former group to claims of employees long separated from active employment will be significantly greater than that of their competitors. (ii) Some companies engaged in coal mining in years past on a much larger scale and with many more employees than currently. This is not an unusual situation in a "depleting asset" industry, where smaller companies often lack the resources with which to continue the acquisition and development of new properties. Stronger competitors, on the other hand, may have operated on a constant or an increasingly large scale.<sup>9</sup>

In each case the competitively disadvantaged companies simply will be unable to spread costs in any meaningful sense. As already noted, the theory long recognized as underlying workmen's compensation laws is that economic losses suffered by workers as a result of disease or injury should be a current operating expense, shared by the employer and the consumers of the

<sup>8</sup> Indeed, the number of former miners and survivors whom an individual employer is obliged to compensate could be larger than the employer's present workforce.

<sup>9</sup> In addition, the incidence of liability to former miners may be skewed artificially by the regulation imposing liability upon the company which last employed the claimant without regard to previous employment with other companies. 20 CFR § 725.311 (1975). The validity of this regulation remains to be considered. See *ante*, at 9-10.

this is a  
big leap.

but costs will  
still be  
spread to  
operators in  
a rational way.  
Is sole of consumers  
in bearing  
burden  
essential?



## 8 USERY v. TURNER ELKHORN MINING CO.

products then produced. In its retroactive operation, however, the Act imposes liability *after* the opportunity to spread costs through market forces has passed. Individual operators burdened with retrospective liabilities, especially the smaller ones, will be unable to compete with those not so burdened, as their current cost of doing business will be inflated by benefit payments bearing no relation to current operations. The Act's result thus is not to spread costs to "the operators and the coal consumers," *ante*, at 14, but simply to penalize the disadvantaged operators despite their conceded lack of culpability.<sup>10</sup> This discrimination between burdened and unburdened firms has no relation to Congress' attempt to enact a cost-spreading mechanism,<sup>11</sup> and the Act accordingly violates the Fifth Amendment in this respect.

question is whether classification is related to purpose

<sup>10</sup> The Court notes that "coal consumers" "profited from the fruit of [former employees'] labor," *ante*, at 14, and therefore should share the burden of benefit payments. This rationale demonstrates conclusively the irrationality of the Act's retroactive liability as a cost-spreading mechanism. A coal mining concern cannot retroactively increase its prices to the former customers who benefited from the pre-1969 labors of former miners. The only consumers, therefore, who could bear these burdens are those who purchase coal currently. But in a free market such customers cannot be expected to pay reparation add-on for coal produced by disadvantaged coal companies when the same product is readily obtainable from others at a lower price. The result must be to make the burdened companies uncompetitive.

willingly

<sup>11</sup> The penalizing of concededly blameless firms with larger numbers of diseased former employees is irrational only because of the retroactive nature of the liability. In their prospective application it is rational for Title IV and other workmen's compensation schemes to disadvantage competitively employers who take less effective precautions to protect their employees. See —, — n. 5, *supra*. But only prospective liability creates an incentive for occupational safety measures.

They can spread costs — it's just that they may not survive after doing so.

could they penalize them just on an "unjust enrichment" kind of theory? that seems to be what was done — & it could have been deliberate.

as now written this sounds like political principle rather than economic fact.



## C

The Court apparently fails to recognize the invidious nature of this discrimination despite its acknowledgment that the justifications that rationalize prospective legislation may not rationalize retrospective legislation. The Court's error, as I view it, may stem in part from its frequent rejection in the past of challenges to legislation that had some retroactive application. See *ante*, at 12. It therefore is appropriate to note how little support previous cases offer for today's holding. The Court cites three cases as standing for the proposition that "a new duty or liability [might be] based on past acts," *ante*, at 12. In *Funkhouser v. J. B. Preston Co.*, 290 U. S. 163 (1933), however, the question was whether a verdict in a breach-of-contract case could include interest when the statute providing for the assessment of interest was passed after the claim arose. *Funkhouser* thus differed significantly from this case, as the statute provided only an additional remedial component for the breach of a duty already defined. *Lichter v. United States*, 334 U. S. 742 (1948), and *Welch v. Henry*, 305 U. S. 134 (1938), were both essentially tax cases, a category of cases that are virtually sui generis, as the Court recognized in *Welch*.<sup>12</sup> While drawing no significant support from these cases, the Court finds it necessary to distinguish the case most directly in point—*Railroad Retirement Bd. v. Alton R. Co.*, 295 U. S. 330 (1935). I am not persuaded by the Court's distinction of *Alton*, which turns on an asserted difference between industrial "human wastage," *Alton*, *supra*, at 384

<sup>12</sup> *Welch v. Henry*, 305 U. S. 134, 146 (1938): "Taxation is neither a penalty imposed on the taxpayer nor a liability which he assumes by contract. It is but a way of apportioning the cost of government among those who in some measure are privileged to enjoy its benefits and must bear its burdens."

*sounds similar  
to this case*



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(Hughes, C. J., dissenting), stemming from age and that stemming from disease. It seems to me that Congress is equally entitled to allocate ~~the costs of either age or disease~~ *prospectively?* "to the [employer as] an actual, measurable cost of his business," *ante*, at 15. As a unanimous Court found the retroactive imposition of pension benefits was impermissible in *Alton*, the retroactive imposition of the benefits in question here also should be impermissible. *this is less than convincing*

## III

For the foregoing reasons I would hold the Act unconstitutional insofar as it requires the Operators to pay benefits to miners not employed on the date of its enactment.<sup>13</sup> In my view, it simply is not rational to structure a legislative remedy in a way that imposes on one class of coal mining concerns a burden that, under the circumstances, fairly belongs on the entire industry or on the public at large.

*Carl - I guess we all 4 should talk to him. Although this is not inconsistent with Murgia, I think it may give him problems in persuading others to join that opinion because it suggests that he would put a lot of teeth in the rational basis inquiry - something PS + HAD at least are*

<sup>13</sup> Section 510 of the Act, see note at 30 U. S. C. § 802, provides that the invalidity of any application of the Act shall not affect the application of the Act to other "persons or circumstances."

In light of the judgment of the Court, I do not deem it necessary to consider whether the Act authorizes the Federal Government to pay benefits to former miners filing after June 30, 1973, despite the constitutional bar I perceive against the retroactive imposition of liability on their employers. See § 424, 30 U. S. C. § 934.

*reluctant to do. He should be made aware of that problem.*

*I admire you.*

*C.*

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist  
Mr. Justice Stevens

From: Mr. Justice Stewart

Circulated: MAY 25 1976

Recirculated: \_\_\_\_\_

1st DRAFT

SUPREME COURT OF THE UNITED STATES

*Reviewed*

Nos. 74-1302 AND 74-1316

W. J. Usery, Jr., Secretary  
of the United States De-  
partment of Labor,  
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et al.

On Appeals from the United  
States District Court for  
the Eastern District of  
Kentucky.

*I will  
take  
another  
look  
at this  
in light  
of my  
dissent*

[June —, 1976]

MR. JUSTICE STEWART, concurring in part and dissent-  
ing in part.

Although I agree with much of the Court's opinion, I  
cannot join that opinion for at least two reasons.

A

In upholding the constitutional validity of the irre-  
buttable presumption contained in § 411 (c)(3) of the  
Act now before us, the Court's opinion does not so much  
as mention the decision of this Court that seems to me  
wholly dispositive. I refer to *Weinberger v. Salfi*, 422  
U. S. 749, decided less than a year ago. The Court in  
that case, relying *inter alia* on *Dandridge v. Williams*,  
397 U. S. 471, and *Richardson v. Belcher*, 404 U. S. 78,



clearly established the constitutional standard for legislation of the kind before us here:

"[T]he question raised is not whether a statutory provision precisely filters out those, and only those, who are in the factual position which generated the congressional concern reflected in the statute. Such a rule would ban all prophylactic provisions . . . . Nor is the question whether the provision filters out a substantial part of the class which caused congressional concern, or whether it filters out more members of the class than nonmembers. The question is whether Congress, its concern having been reasonably aroused by the possibility of an abuse which it legitimately desired to avoid, could rationally have concluded both that a particular limitation or qualification would protect against its occurrence, and that the expense and other difficulties of individual determinations justified the inherent imprecision of a prophylactic rule. . . . 422 U. S., at 777.

The provision of § 411 (c)(3) at issue surely passes muster under this standard, and I would uphold it on that basis rather than upon the grounds discussed by the Court. *Ante*, at 17-20.

### B

I cannot accept the Court's conclusion, *ante*, at 32-34, that the limitation on rebuttal evidence in § 411 (c)(4), 30 U. S. C. § 921 (c)(4) (1970 ed., Supp. IV), is inapplicable to "transition" determinations under § 415 insofar as those determinations bind operators. Section 415 (a)(5), 30 U. S. C. § 925 (a)(5), provides that an "operator . . . shall be bound by the determinations of the Secretary of Labor [on a transition] claim as if the claim had been filed pursuant to part C of this sub-



chapter and section 932 of this title had been applicable to such operator." As the Court correctly observes, the critical question is thus whether the § 411 (c)(4) limitation would apply "if the claim had been filed pursuant to part C . . . and section 932. . . ."

The Court reads the "plain language" of § 411 (c)(4), and in particular the reference to "the Secretary [of Health, Education and Welfare]," to mean that "the limitation applies only to 'the Secretary' and not to an operator seeking to avoid liability under § 415 [30 U. S. C. § 925] or § 422 [30 U. S. C. § 932]." *Ante*, at 32. This reading, the Court concludes, is "fortified by the legislative history" and in particular by the "Senate Report on § 411 (c)(4) [which] specifically states that the limitation on rebuttal applies to the Secretary of Health, Education, and Welfare, but nowhere suggests that it binds an operator." *Ibid*.

The Court's analysis omits any consideration of the effect of § 430, 30 U. S. C. § 940, which provides as follows:

"The amendments made by the Black Lung Benefits Act of 1972 to part B of this subchapter shall, to the extent appropriate, also apply to [Part C]: *Provided*, That for the purpose of determining the applicability of the presumption established by section 921 (c)(4) of this title to claims filed under this part, no period of employment after June 30, 1971, shall be considered in determining whether a miner was employed at least fifteen years in one or more underground mines."

Since the limitation on rebuttal evidence in § 411 (c)(4) was created by the "amendments made by the Black Lung Benefits Act of 1972" it would seem to follow that the limitation applies to Part C determinations. This



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inference is reinforced by the Senate Report, which stated:

"New section 430 requires that amendments to part B be applied, wherever appropriate, to part C.

"Questions were raised during the Committee deliberations over whether the amendments to part B would automatically be applicable, where appropriate, to part C,

"Although it would appear clear that the same standards are to govern, the Committee concluded that it would be best to so specify.

"It is contemplated by the Committee that the applicable portions of following sections of part B, as amended, would apply to part C: section 411, section 412 (except the last sentence of subsection (b) thereof), section 413, and section 414." Senate Report, at 21.

See also Senate Report, at 33.

The only play in the tight linkage of Part C to the amendments to Part B is that afforded by the proviso in § 430 and by the phrase "to the extent appropriate" which appears in that section. The proviso does not remove the rebuttal limitation, but it does alter § 411 (c) (4)'s allocation of the burden of proof in another crucial respect: It limits the period of employment which may be considered for purposes of determining the applicability of the presumption. The presence of the proviso is relevant in two respects. First, it underscores the basic applicability to Part C determinations of the § 411 (c) (4) rebuttal presumption. Second, it demonstrates that Congress knew how to place a significant limitation on the applicability of that presumption when it chose to do so.



The care and precision which Congress used in drafting this qualifying language bears on the propriety of reading the phrase "to the extent appropriate" as obliquely qualifying the applicability of the rebuttal limitation to Part C determinations. That limitation is part and parcel of an elaborate reallocation of the burden of proving disability resulting from pneumoconiosis. Under prior Social Security procedure "if an x-ray [did] not show totally disabling pneumoconiosis, no further processing of a claim [was] allowed. Thus, any further evidence of disability [was] not allowed if the x-ray show[ed] negative." Senate Report, at 11. This heavy reliance on X-ray evidence had unfortunate consequences for coal miners because of the inability of X-ray examinations to detect pneumoconiosis in some instances. Congress responded to this particular problem by

"prohibiting denial of a claim solely on the basis of an X-ray, by providing a presumption of pneumoconiosis for miners with respiratory or pulmonary disability where they have worked 15 years or more in a coal mine, and by requiring the Social Security Administration to use tests other than the X-ray to establish the basis for a judgment that a miner is or is not totally disabled due to pneumoconiosis."

*Ibid.*

The 15-year rebuttable presumption embodied in § 411 (c)(4) was perhaps the most significant feature of Congress' response. Based in part on testimony of the Surgeon General that "[f]or work periods greater than 15 years underground, there was a linear increase in the prevalence of the disease with years spent underground," *id.*, at 13, the presumption embodied a congressional decision to "giv[e] the benefit of the doubt," *id.*, at 11, to a specific class of claimants totally disabled by respiratory or pulmonary impairments who could not prove by X-ray



evidence that the impairment resulted from pneumoconiosis. The presumption was rebuttable only if the respondent could show either that "(A) such miner does not, or did not, have pneumoconiosis, or that (B) his respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine." § 411 (c)(4), 30 U. S. C. § 921 (c)(4).

It is difficult to believe that Congress would have used the phrase "to the extent appropriate" in § 430 to withdraw the protection of the rebuttal limitation under Part C while retaining the rebuttable presumption of which it is an integral part. Such an interpretation is inconsistent with the care Congress displayed in drafting the § 430 proviso. Moreover, it leads necessarily to other improbable results. The Court's approach, for instance, necessarily implies that Congress extended the benefit of the § 411 (c)(4) presumption to "surface, as well as underground, miners [in specified circumstances]," Senate Report, at 2, with the intention that the protection would lapse as soon as Part C came into play. The relevant sentence in § 411 (c)(4) states that "[t]he Secretary [of Health, Education and Welfare] shall not apply all of a portion of the requirement of this paragraph that the miner work in an underground mine where he determines that conditions of a miner's employment in a coal mine other than an underground mine were substantially similar to conditions in an underground mine." (Emphasis added.) If the operative principle is that provisions in § 411 (c)(4) which bind "the Secretary [of Health, Education and Welfare]" are automatically "inappropriate" for Part C proceedings then surface miners would be stripped of the benefits of § 411 (c)(4) as soon as the legislative scheme enters its transitional stage.

Moreover, the Court's reading of the statute is



anomalous in terms of the overall structure of Part C. The primary goal of Congress in framing Part C was to transfer adjudicatory responsibilities over coal miners' pneumoconiosis claims to state workmen's compensation tribunals, but only if the state compensation law was found by the Secretary of Labor to provide "standards for determining death or total disability due to pneumoconiosis . . . substantially equivalent to . . . those standards established under part B of this subchapter. . . ." Section 421 (b)(2)(C), 30 U. S. C. § 931 (b)(2)(C). One of the Part B standards is the rebuttal limitation in § 411 (c)(4). Thus, the Secretary of Labor would not be empowered to approve a state law which did not contain a "substantially equivalent" evidentiary limitation.

The delegation of adjudicatory responsibility to the Secretary of Labor under Part C was a backstop measure, intended to provide a forum for presentation of claims during any period after January 1, 1974, when a state workmen's compensation law was not included on the Secretary of Labor's list of state laws with provisions "substantially equivalent" to those in Part B. § 421 (a), 30 U. S. C. § 931 (a). See Senate Report, at 19-21. Since the very reason for withholding approval of a state law and providing an alternative federal forum is lack of "substantial equivalence" between the state law provisions and the "standards established under part B," including the rebuttal limitation in § 411 (c)(4), it would be anomalous if the substitute federal forum could employ evidentiary rules which deviate substantially from those in Part B.

The statutory language and legislative history simply will not yield such an unlikely result. The phrase "to the extent appropriate" in § 430, 30 U. S. C. § 940, plainly refers to language in part B which has no rele-



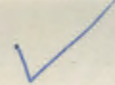
vance to Part C, notably the language that specifies that "the Secretary [of Health, Education and Welfare]" is to have certain adjudicative responsibilities. These are the references that are not "appropriate" under Part C, because Part C transfers adjudicative responsibilities to the States or, in the alternative, to the Secretary of Labor. The obvious purpose of the phrase "to the extent appropriate" is to accommodate minor linguistic variations resulting from this transfer of responsibility. Thus, the interaction of the phrase "to the extent appropriate" and the reference to "the Secretary" in the rebuttal limitation of § 411 (c)(4) does not render the entire limitation "inappropriate" to Part C proceedings; it merely renders the reference to "the Secretary" inappropriate under Part C.

It is significant that the Court's interpretation of § 411 (c)(4)'s rebuttal limitation is not urged or even suggested by any party to this suit. The Government's position is that the District Court erred by reading § 411 (c)(4) to foreclose a showing that would refute total disability. The Government is clearly correct. The § 411 (c)(4) presumption comes into play only after the claimant establishes total disability. See § 411 (c)(4), 30 U. S. C. § 921 (c)(4) ("... and if other evidence demonstrates the existence of a totally disabling respiratory or pulmonary impairment, then there shall be a rebuttable presumption. . . ."). In addition, the District Court ruled that § 411 (c)(4) places upon a specific coal mine owner the burden of proving that the respiratory or pulmonary disease did not arise out of coal mine employment. The Government urges that this construction is erroneous, because it overlooks the fact that under 30 U. S. C. § 932 (c) a specific operator can also defeat liability by showing that the disability did not arise, even in part, out of employment in his mine dur-



ing the period when he operated it. Again, the Government is clearly correct. If the operator makes the § 932 (c) showing, then the § 411 (c)(4) presumption—and the rebuttal limitation—is irrelevant. Accordingly, I would reverse the District Court's ruling that the § 411 (c)(4) rebuttal limitation violates the Constitution.





CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

June 7, 1976

Re: No. 74-1302 - Usery v. Turner Elkhorn Mining Co.  
No. 74-1316 - Turner Elkhorn Mining Co. v. Usery

Dear Thurgood:

Please join me.

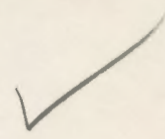
Sincerely,

Mr. Justice Marshall

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE POTTER STEWART



June 16, 1976

Nos. 74-1302 & 74-1316  
Usery v. Turner Elkhorn Mining Co.

Dear Thurgood,

In response to your recirculation  
of today, I have decided to delete Part A  
of my separate opinion. Bill Rehnquist  
agrees with this decision.

Sincerely yours,

P.S.  
/

Mr. Justice Marshall

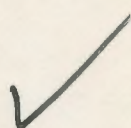
Copies to the Conference



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

June 16, 1976



Re: (74-1302 - Usery v. Turner Elkhorn Mining Co.  
(74-1316 - Turner Elkhorn Mining Co. v. Usery)

Dear Thurgood:

As of now I will concur in the judgment.

Regards,

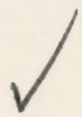
WBS

Mr. Justice Marshall

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST



June 25, 1976

Re: No. 74-1302 and 74-1316 - Usery v. Turner, et al.

Dear Potter:

Please join me in your concurring opinion.

Sincerely,

Mr. Justice Stewart

Copies to the Conference



As delivered to  
Printer on 6/26/76

LFP  
File  
Copy

~~First~~ DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 74-1302 AND 74-1316

W. J. Usery, Jr., Secretary  
of the United States De-  
partment of Labor,  
et al., Appellants,  
74-1302 v.

Turner Elkhorn Mining  
Company et al.

Turner Elkhorn Mining  
Company et al.,  
Appellants,  
74-1316 v.

W. J. Usery, Jr., Secretary  
of the United States De-  
partment of Labor,  
et al.

On Appeals from the United  
States District Court for  
the Eastern District of  
Kentucky.

June  
[Date] —, 1976]

MR. JUSTICE POWELL, concurring.

Appellants in No. 74-1316, the Operators, challenge as unconstitutional the retroactive obligations imposed on them by the Federal Coal Mine Health and Safety Act of 1969, 83 Stat. 792, as amended by the Black Lung Benefits Act of 1972, 86 Stat. 150, 30 U. S. C. § 901 *et seq.* (Act). The Court rejects their contention in Part IV of its opinion. I ~~disagree from Part IV, but~~ concur in other portions of the opinion not inconsistent with the views herein expressed.

I

Coal miner's pneumoconiosis was not recognized in the United States until the 1950's, and there was no federal

concur in the judy  
ment as to  
Part IV, and

## 2 USERY v. TURNER ELKHORN MINING CO.

legislation providing benefits to its victims until the enactment of this statute in 1969. In Title IV of the Act, Congress significantly redefined the respective rights and obligations of miners and their employers in regard to this disease by establishing a benefits scheme to compensate victims of pneumoconiosis.<sup>1</sup> Under Title IV miners who filed claims before July 1, 1973, are to collect benefits from the Federal Government, §§ 411-414, 30 U. S. C. §§ 921-924.<sup>2</sup> Miners filing claims after June 30, 1973, are to collect benefits until 1981, see *ante*, at 22-23, from their individual employers. § 415, 421-431, 30 U. S. C. §§ 925, 931-941.<sup>3</sup> Under the statute, the class of claimants to which individual employers are liable includes both (i) miners employed at the time of or after enactment and (ii) miners no longer employed in the industry at the time of enactment ("former miners").

*to receive* The unprecedented feature of the Act is that miners may be eligible for benefits from particular coal-mining concern, ~~even if the disability upon which the claims are based developed before enactment of the law, and even if the miner was no longer employed in the industry at the time of enactment.~~ The Department of Labor already has made initial determinations of liability

<sup>1</sup> Title II of the Act prescribes the maintenance of less hazardous mine conditions in the future. § 201 *et seq.*, 30 U. S. C. § 841 *et seq.*

<sup>2</sup> As does the Court, I simplify by not distinguishing between claims by employees and claims by their survivors. See *ante*, at 10 n. 13.

<sup>3</sup> Claims filed between July 1, 1973, and December 31, 1973, were to be paid by the Federal Government until January 1, 1974, when they became the responsibility of individual mining concerns. § 415, 30 U. S. C. § 925. Liability on the part of individual mining concerns arises only if the claimant does not have recourse to an applicable state workmen's compensation program approved by the Secretary of Labor, §§ 421-422, 30 U. S. C. §§ 931-932, but no such state programs have been approved. See *ante*, at 4-5.



against one of the Operators and in favor of claimants whose employment terminated decades ago.<sup>4</sup>

## II.

The Operators do not challenge their liability to miners employed at the time of or after enactment, a liability which accords with familiar principles of workmen's compensation.<sup>5</sup> They contend, however, that a statutory liability to former miners has been imposed in violation of the Fifth Amendment guarantee against arbitrary, irrational, or discriminatory legislation, see, e.g., Richardson v. Belcher, 404 U.S. 78, 81 (1971), as there is no rational justification for imposing liability to former miners upon individual mine owners.

The Court recognizes that its evaluation of the rationality of the employers' challenged liability must take into account the retroactive nature of the liability:

"The retrospective aspects of the legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former. Thus, in this case the justification for the retrospective imposition of liability

must take into account the possibilities that the Operators may not have known of the danger of their employees' contracting pneumoconiosis, and that even if they did know of the danger their conduct may have been taken in reliance upon the current state of the law . . . ." Ante, at 13.

The Court then acknowledges that the Act would not be justified "on any theory of deterrence . . . or blameworthiness." Id., at 13. It nonetheless sustains the provisions for retroactive liability, reasoning as follows:

"We find . . . that the imposition of liability for the effects of disabilities bred in the past is justified as a rational measure to spread the cost of the employees' disabilities to those who have profited from the fruits of their labor - the operators and the coal consumers." Id., at 13-14.

\* \* \* \*

"We are unwilling to assess the wisdom of Congress' chosen scheme by examining the degree to which the 'cost-savings' enjoyed by operators in the pre-enactment period produced 'excess' profits, or the degree to which the retrospective liability imposed on the early operators can now be passed on to the consumer. It is enough to say that the Act approaches the problem of cost-spreading rationally." Id., at 14-15.

In my view whether the retroactive liability is constitutional is a considerably closer question than the Court's treatment suggests. The rationality of retrospective



liability as a cost-spreading device is highly questionable. I turn first to the question of cost-spreading to the Operators.

If coal mining concerns actually enjoyed "excess" profits in the preenactment period by virtue of their nonliability for pneumoconiosis, and if such profits could be quantified in some discernible way, Congress rationally could redistribute the profits to former miners whose uncompensated illnesses created them. But, in this content, the term "excess profits" must mean profits over and above those that Operators would have made in years and decades past if they had set aside from current operations funds sufficient to provide the compensation, although under no obligation to do so. It is unlikely that such profits existed. Coal prices are determined in the market by normal competitive forces. One therefore would expect that, had a compensation increment been added to operating costs, the Operators simply would have passed it on to consumers, thereby leaving their profit return unaffected.

Nor can I accept without serious question the Court's view that the costs now imposed by the Act may be passed on to consumers. Firms burdened with retroactive payments must meet that expense from current production and current sales in a market where prices must be competitive with the prices of firms not so burdened.

One ordinarily would expect that if burdened firms are to meet both competitive prices and their retroactive obligations, their profits necessarily will be less than those of their competitors. Thus, the burdened firms in all likelihood will have to bear the costs of the retroactive liability rather than passing those costs on to consumers. And they must bear such costs quite without regard to whether "excess profits" may have been made in some earlier years. <sup>6</sup>

In some industries conditions might be such that cost-spreading to consumers would not be prevented by a competitive disadvantaging of burdened firms. It seems most unlikely, however, that the coal industry is such an industry. A notable fact about coal mining is that the industry currently employs only about 150,000 persons, whereas in 1939 it employed nearly 450,000. Brief for Operators 24. The reduced scale of employment in the coal industry, combined with the liability to former miners and their survivors, means that retroactive obligations almost certainly will be disproportionate to the scale of current operations. <sup>7</sup> Moreover, it is unlikely that liability to former miners will be distributed randomly across the industry, as it is dictated by historical patterns that may be wholly unrelated to the present contours of the



industry. Two examples are illustrative: (i) Some coal-mining concerns have been in the mining business for decades, while some competitors have commenced operation more recently. The exposure of the former group to claims of employees long separated from active employment is likely to be significantly greater than that of their competitors. (ii) Some companies engaged in coal mining in years past on a much larger scale and with many more employees than currently. This is not an unusual situation in a "depleting asset" industry, where smaller companies often lack the resources with which to continue the acquisition and development of new properties. Stronger competitors, on the other hand, may have operated on a constant or an increasingly large scale.<sup>8</sup> In each case the competitively disadvantaged companies may be unable to spread a substantial portion of their costs to consumers. In view of these considerations it is unrealistic to think that the Act will spread costs to "the operators and the coal consumers," ante, at 14, and thus I question the Court's conclusion that the Act is rational in imposing retroactive liability.

### III.

Despite the foregoing, I must concur in the judgment on the record before us. Congress had broad

discretion in formulating a statute to deal with the serious problem of pneumoconiosis affecting former miners. E.g., Richardson, supra; cf. Williamson v. Lee Optical Co., 348 U.S. 483 (1955). Nor does the Constitution require that legislation on economic matters be compatible with sound economics or even with normal fairness. As a result, economic and remedial social enactments carry a strong presumption of constitutionality, e.g., United States v. Carolene Products Co., 304 U.S. 144, 148 (1938), and the Operators had the heavy burden of showing the Act to be unconstitutional.

The constitutionality of the retrospective liability in question here ultimately turns on the sophisticated questions of economic fact suggested above. In this case, decided on the Government's motion for summary judgment, the Operators have failed to make factual showings that support their sweeping assertions of irrationality. Although I find these assertions strongly suggestive that Congress has acted irrationally in pursuing a legitimate end, I am not satisfied that they are sufficient - in the absence of <sup>appropriate support -</sup> ~~any~~ factual <sup>showing</sup> - to override the presumption of constitutionality. Accordingly, I agree that the Government was entitled to summary judgment on this record.



N-1

FOOTNOTES

4. Favorable initial determinations have been made for claimants who left mine work in 1920, 1923, 1927, 1931, 1932, 1937, 1943, 1946, and 1948. Brief for Operators, 30 n. 1. These determinations rebut the Government's suggestion that in combination the initial period of federal liability and the statute of limitations specified in § 422(f)(1), 30 U.S.C. § 932(f)(1), will prevent employer liability to miners who left the industry before passage of the Act. See ante, at 11-12, n. 14.

5. Congress apparently recognized that the employers burdened by retroactive liability were not blameworthy. Senator Javits, who played a significant role in the development of individual-employer liability, see Brief for Operators, at 34, thought that the "blame" for past neglect must be shared by "all of us", including "the industry, the medical profession, and the Government - particularly the Public Health Service." House Comm. on Education and Labor, Legislative History/Federal Coal Mine Health and Safety Act, 338 (Comm. Print 1970)(floor remarks).

The retroactive nature of the liability makes deterrence an insufficient justification. In their prospective application, it is rational for Title IV and other workmen's compensation schemes to disadvantage competitively employers who take less effective precautions

14-2

to protect their employees. But only prospective liability creates an incentive for occupational safety measures.

6. It is, of course, impossible to spread the cost to "coal consumers" who "profited from the fruit of [former employees'] labor." Ante, at 14. A coal mining concern cannot retroactively increase its prices to the former customers who benefitted from the pre-1969 labors of former miners. The only consumers, therefore, who could bear these burdens are those who purchase coal currently. But in a free market such customers cannot be expected to pay a reparation add-on for coal produced by disadvantaged coal companies when the same product is readily obtainable from others at a lower price.

7. Indeed, the number of former miners and survivors whom an individual employer is obliged to compensate could be larger than the employer's present workforce.

8. In addition, the incidence of liability to former miners may be skewed artificially by the regulation imposing liability upon the company which last employed the claimant without regard to previous employment with other companies.



20 CFR § 725.311 (1975). The validity of this regulation remains to be considered. See ante, at 9-10.

Unsub

In this case, decided on the Government's motion for summary judgment, the operators have failed to make factual showings that support their sweeping assertions of irrationality. Although I find these assertions strongly suggestive that Congress has chosen an irrational means to attain a legitimate end, I am not satisfied that they are sufficient - in the absence of proof - to override the presumption of constitutionality. Accordingly, I agree that the Government was entitled to summary judgment on this record.



~~KS Master~~

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economic background.~~

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# SUPREME COURT OF THE UNITED STATES

Nos. 74-1302 AND 74-1316

W. J. Usery, Jr., Secretary  
of the United States De-  
partment of Labor,  
et al., Appellants,  
74-1302 v.

Turner Elkhorn Mining  
Company et al.

Turner Elkhorn Mining  
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Appellants,  
74-1316 v.

W. J. Usery, Jr., Secretary  
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On Appeals from the United  
States District Court for  
the Eastern District of  
Kentucky.

[June —, 1976]

MR. JUSTICE POWELL, concurring.

Appellants in No. 74-1316, the Operators, challenge as unconstitutional the retroactive obligations imposed on them by the Federal Coal Mine Health and Safety Act of 1969, 83 Stat. 792, as amended by the Black Lung Benefits Act of 1972, 86 Stat. 150, 30 U. S. C. § 901 *et seq.* (Act). The Court rejects their contention in Part IV of its opinion. I concur in the judgment as to Part IV, and concur in other portions of the opinion not inconsistent with the views herein expressed.

I

Coal miner's pneumoconiosis was not recognized in the United States until the 1950's, and there was no federal



## 2 USERY v. TURNER ELKHORN MINING CO.

21 ✓  
 legislation providing benefits to its victims until the enactment of this statute in 1969. In Title IV of the Act, Congress significantly redefined the respective rights and obligations of miners and their employers in regard to this disease by establishing a benefits scheme to compensate victims of pneumoconiosis.<sup>1</sup> Under Title IV miners who filed claims before July 1, 1973, are to collect benefits from the Federal Government, §§ 411-414, 30 U. S. C. §§ 921-924.<sup>2</sup> Miners filing claims after June 30, 1973, are to collect benefits until 1981, see *ante*, at ~~22-23~~ 21-22, n. 25, from their individual employers. § 415, 421-431, 30 U. S. C. §§ 925, 931-941.<sup>3</sup> Under the statute, the class of claimants to which individual employers are liable includes both (i) miners employed at the time of or after enactment and (ii) miners no longer employed in the industry at the time of enactment ("former miners").

The unprecedented feature of the Act is that miners may be eligible to receive benefits from a particular coal-mining concern even if the miner was no longer employed in the industry at the time of enactment. The Department of Labor already has made initial determinations of liability against one of the Operators and

<sup>1</sup> Title II of the Act prescribes the maintenance of less hazardous mine conditions in the future. § 201 *et seq.*, 30 U. S. C. § 841 *et seq.*

<sup>2</sup> As does the Court, I simplify by not distinguishing between claims by employees and claims by their survivors. See *ante*, at 10 n. 13.

<sup>3</sup> Claims filed between July 1, 1973, and December 31, 1973, were to be paid by the Federal Government until January 1, 1974, when they became the responsibility of individual mining concerns. § 415, 30 U. S. C. § 925. Liability on the part of individual mining concerns arises only if the claimant does not have recourse to an applicable state workmen's compensation program approved by the Secretary of Labor, §§ 421-422, 30 U. S. C. §§ 931-932, but no such state programs have been approved. See *ante*, at 4-5.

21-22,

December 31, 1973, after which



in favor of claimants whose employment terminated decades ago.<sup>4</sup>

## II

The Operators do not challenge their liability to miners employed at the time of or after enactment, a liability which accords with familiar principles of workmen's compensation.<sup>5</sup> They contend, however, that a statutory liability to former miners has been imposed in violation of the Fifth Amendment guarantee against arbitrary, irrational, or discriminatory legislation, see, *e. g.*, *Richardson v. Belcher*, 404 U. S. 78, 81 (1971), as there is no rational justification for imposing liability to former miners upon individual mine owners.

The Court recognizes that its evaluation of the ra-

<sup>4</sup> Favorable initial determinations have been made for claimants who left mine work in ~~1920~~, 1923, 1927, 1931, 1932, 1937, 1943, 1946, and 1948. Brief for Operators, 30 n. 1. These determinations rebut the Government's suggestion that in combination the initial period of federal liability and the statute of limitations specified in § 422 (f) (1), 30 U. S. C. § 932 (f) (1), will prevent employer liability to miners who left the industry before passage of the Act. See *ante*, at 11-12, n. 14.

<sup>5</sup> Congress apparently recognized that the employers burdened by retroactive liability were not blameworthy. Senator Javits, who played a significant role in the development of individual-employer liability, see Brief for Operators, at 34, thought that the "blame" for past neglect must be shared by "all of us," including "the industry, the medical profession, and the Government—particularly the Public Health Service." House Comm. on Education and Labor, Legislative History/Federal Coal Mine Health and Safety Act, 338 (Comm. Print 1970) (floor remarks).

The retroactive nature of the liability makes deterrence an insufficient justification. In their prospective application, it is rational for Title IV and other workmen's compensation schemes to disadvantage competitively employers who take less effective precautions to protect their employees. But only prospective liability creates an incentive for occupational safety measures.



## 4 USERY v. TURNER ELKHORN MINING CO.

tionality of the employers' challenged liability must take into account the retroactive nature of the liability:

"The retrospective aspects of ~~the~~ legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former. Thus, in this case the justification for the retrospective imposition of liability must take into account the possibilities that the Operators may not have known of the danger of their employees' contracting pneumoconiosis, and that even if they did know of the danger their conduct may have been taken in reliance upon the current state of the law . . . ." *Ante*, at 12.

The Court then acknowledges that the Act would not be justified "on any theory of deterrence . . . or blameworthiness." *Id.*, at 13. It nonetheless sustains the provisions for retroactive liability, reasoning as follows:

"We find . . . that the imposition of liability for the effects of disabilities bred in the past is justified as a rational measure to spread the cost of the employees' disabilities to those who have profited from the fruits of their labor—the operators and the coal consumers." *Id.*, at 13-14.

"We are unwilling to assess the wisdom of Congress' chosen scheme by examining the degree to which the 'cost-savings' enjoyed by operators in the pre-enactment period produced 'excess' profits, or the degree to which the retrospective liability imposed on the early operators can now be passed on to the consumer. It is enough to say that the Act approaches the problem of cost-spreading rationally." *Id.*, at 14-15.

In my view whether the retroactive liability is consti-

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12-13 ✓

5 ✓

# . . . ✓



tutional is a considerably closer question than the Court's treatment suggests. The rationality of retrospective liability as a cost-spreading device is highly questionable. I turn first to the question of cost spreading to the Operators.

If coal mining concerns actually enjoyed "excess" profits in the pre-enactment period by virtue of their nonliability for pneumoconiosis, and if such profits could be quantified in some discernible way, Congress rationally could redistribute the profits to former miners whose uncompensated illnesses created them. But, in this context, the term "excess profits" must mean profits over and above those that Operators would have made in years and decades past if they had set aside from current operations funds sufficient to provide the compensation, although under no obligation to do so. It is unlikely that such profits existed. Coal prices are determined in the market by normal competitive forces. One therefore would expect that, had a compensation increment been added to operating costs, the Operators simply would have passed it on to consumers, thereby leaving their profit return unaffected.

Nor can I accept without serious question the Court's view that the costs now imposed by the Act may be passed on to consumers. Firms burdened with retroactive payments must meet that expense from current production and current sales in a market where prices must be competitive with the prices of firms not so burdened. One ordinarily would expect that if burdened firms are to meet both competitive prices and their retroactive obligations, their profits necessarily will be less than those of their competitors. Thus, the burdened firms in all likelihood will have to bear the costs of the retroactive liability rather than passing those costs on to consumers. And they must bear such costs quite

impose retrospective liability for the benefit of the miners concerned.

The coal industry is highly competitive and prices normally are determined by market forces.

over the long term

most of profitability relatively unaffected. In short, the talk of "excess profits" in any realistic sense is wholly speculative.



without regard to whether "excess profits" may have been made in some earlier years.<sup>6</sup>

In some industries conditions might be such that ~~cost spreading to consumers would not be prevented by a competitive disadvantaging of burdened firms.~~ It seems most unlikely, however, that the coal industry is such an industry. A notable fact about coal mining is that the industry currently employs only about 150,000 persons, whereas in 1939 it employed nearly 450,000. Brief for Operators 24. The reduced scale of employment in the coal industry, combined with the liability to former miners and their survivors, means that retroactive obligations almost certainly will be disproportionate to the scale of current operations.<sup>7</sup> Moreover, it is unlikely that liability to former miners will be distributed randomly across the industry, as it is dictated by historical patterns that may be wholly unrelated to the present contours of the industry. Two examples are illustrative: (i) Some coal-mining concerns have been in the mining business for decades, while some competitors have commenced operation more recently. The exposure of the former group to claims of employees long separated from active employment is likely to be significantly greater than that of their competitors. (ii) Some companies

The cost of retroactively imposed benefits could be spread to consumers.

<sup>6</sup> It is, of course, impossible to spread the cost to "coal consumers" who "profited from the fruit of [former employees'] labor." *Ante*, at 14. A coal mining concern cannot retroactively increase its prices to the former customers who benefitted from the pre-1969 labors of former miners. The only consumers, therefore, who could bear these burdens are those who purchase coal currently. But in a free market such customers cannot be expected to pay a reparation add-on for coal produced by disadvantaged coal companies when the same product is readily obtainable from others at a lower price.

<sup>7</sup> Indeed, the number of former miners and survivors whom an individual employer is obliged to compensate could be larger than the employer's present workforce.



engaged in coal mining in years past on a much larger scale and with many more employees than currently. This is not an unusual situation in a "depleting asset" industry, where smaller companies often lack the resources with which to continue the acquisition and development of new properties. Stronger competitors, on the other hand, may have operated on a constant or an increasingly large scale.<sup>8</sup> In each case the competitively disadvantaged companies may be unable to spread a substantial portion of their costs to consumers. In view of these considerations it is unrealistic to think that the Act will spread costs to "the operators and the coal consumers," *ante*, at 14, and thus I question the Court's conclusion that the Act is rational in imposing retroactive liability.

## III

Despite the foregoing, I must concur in the judgment on the record before us. Congress had broad discretion in formulating a statute to deal with the serious problem of pneumoconiosis affecting former miners. *E. g.*, *Richardson, supra*; cf. *Williamson v. Lee Optical Co.*, 348 U. S. 483 (1955). Nor does the Constitution require that legislation on economic matters be compatible with sound economics or even with normal fairness. As a result, economic and remedial social enactments carry a strong presumption of constitutionality, *e. g.*, *United States v. Carolene Products Co.*, 304 U. S. 144, 148 (1938), and the Operators had the heavy burden of showing the Act to be unconstitutional.

<sup>8</sup> In addition, the incidence of liability to former miners may be skewed artificially by the regulation imposing liability upon the company which last employed the claimant without regard to previous employment with other companies. 20 CFR § 725.311 (1976). The validity of this regulation remains to be considered. See *ante*, at 9-10.



and these facts are likely to vary widely among the Operators. ✓

74-1302 & 74-1316—CONCUR

8 USERY v. TURNER ELKHORN MINING CO.

The constitutionality of the retrospective liability in question here ultimately turns on the sophisticated questions of economic fact suggested above. In this case, decided on the Government's motion for summary judgment, the Operators have failed to make <sup>any</sup> factual showings that support their sweeping assertions of irrationality. Although I find these assertions strongly suggestive that Congress has acted irrationally in pursuing a legitimate end, I am not satisfied that they are sufficient—in the absence of appropriate factual support—to override the presumption of constitutionality. Accordingly, I agree that the Government was entitled to summary judgment on this record,

✓, however,

✓  
9. I would not foreclose the possibility that a particular <sup>mining concern</sup> coal operator, in a proper case, may be able to show that the impact of the Act on its operations is invidiously ~~arbitrary, arbitrary and~~ discriminatory irrational. cf. ante, at 22.



5, 6, 8

✓  
To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Rehnquist  
Mr. Justice Stevens

2nd DRAFT

From: Mr. Justice Powell

SUPREME COURT OF THE UNITED STATES

Circulated: \_\_\_\_\_

Nos. 74-1302 AND 74-1316

Recirculated: 6/30/76

W. J. Usery, Jr., Secretary  
of the United States De-  
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74-1302 v.

Turner Elkhorn Mining  
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On Appeals from the United  
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[June —, 1976]

MR. JUSTICE POWELL, concurring.

Appellants in No. 74-1316, the Operators, challenge as unconstitutional the retroactive obligations imposed on them by the Federal Coal Mine Health and Safety Act of 1969, 83 Stat. 792, as amended by the Black Lung Benefits Act of 1972, 86 Stat. 150, 30 U. S. C. § 901 *et seq.* (Act). The Court rejects their contention in Part IV of its opinion. I concur in the judgment as to Part IV, and concur in other portions of the opinion not inconsistent with the views herein expressed.

I

Coal miner's pneumoconiosis was not recognized in the United States until the 1950's, and there was no federal

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legislation providing benefits to its victims until the enactment of this statute in 1969. In Title IV of the Act, Congress significantly redefined the respective rights and obligations of miners and their employers in regard to this disease by establishing a benefits scheme to compensate victims of pneumoconiosis.<sup>1</sup> Under Title IV miners who filed claims before July 1, 1973, are to collect benefits from the Federal Government, §§ 411–414, 30 U. S. C. §§ 921–924.<sup>2</sup> Miners filing claims after June 30, 1973, are to collect benefits until 1981, see *ante*, at 21–22, n. 24, from their individual employers. § 415, 421–431, 30 U. S. C. §§ 925, 931–941.<sup>3</sup> Under the statute, the class of claimants to which individual employers are liable includes both (i) miners employed at the time of or after enactment and (ii) miners no longer employed in the industry at the time of enactment (“former miners”).

The unprecedented feature of the Act is that miners may be eligible to receive benefits from a particular coal-mining concern even if the miner was no longer employed in the industry at the time of enactment. The Department of Labor already has made initial determinations of liability against one of the Operators and

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<sup>1</sup> Title II of the Act prescribes the maintenance of less hazardous mine conditions in the future. § 201 *et seq.*, 30 U. S. C. § 841 *et seq.*

<sup>2</sup> As does the Court, I simplify by not distinguishing between claims by employees and claims by their survivors. See *ante*, at 10 n. 13.

<sup>3</sup> Claims filed between July 1, 1973, and December 31, 1973, were to be paid by the Federal Government until December 31, 1973, after which they became the responsibility of individual mining concerns. § 415, 30 U. S. C. § 925. Liability on the part of individual mining concerns arises only if the claimant does not have recourse to an applicable state workmen's compensation program approved by the Secretary of Labor, §§ 421–422, 30 U. S. C. §§ 931–932, but no such state programs have been approved. See *ante*, at 4–5.



in favor of claimants whose employment terminated decades ago.<sup>4</sup>

## II

The Operators do not challenge their liability to miners employed at the time of or after enactment, a liability which accords with familiar principles of workmen's compensation.<sup>5</sup> They contend, however, that a statutory liability to former miners has been imposed in violation of the Fifth Amendment guarantee against arbitrary, irrational, or discriminatory legislation, see, *e. g.*, *Richardson v. Belcher*, 404 U. S. 78, 81 (1971), as there is no rational justification for imposing liability to former miners upon individual mine owners.

The Court recognizes that its evaluation of the ra-

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<sup>4</sup> Favorable initial determinations have been made for claimants who left mine work in 1923, 1927, 1931, 1932, 1937, 1943, 1946, and 1948. Brief for Operators, 30 n. 1. These determinations rebut the Government's suggestion that in combination the initial period of federal liability and the statute of limitations specified in § 422 (f)(1), 30 U. S. C. § 932 (f)(1), will prevent employer liability to miners who left the industry before passage of the Act. See *ante*, at 11-12, n. 14.

<sup>5</sup> Congress apparently recognized that the employers burdened by retroactive liability were not blameworthy. Senator Javits, who played a significant role in the development of individual-employer liability, see Brief for Operators, at 34, thought that the "blame" for past neglect must be shared by "all of us," including "the industry, the medical profession, and the Government—particularly the Public Health Service." House Comm. on Education and Labor, Legislative History/Federal Coal Mine Health and Safety Act, 338 (Comm. Print 1970) (floor remarks).

The retroactive nature of the liability makes deterrence an insufficient justification. In their prospective application, it is rational for Title IV and other workmen's compensation schemes to disadvantage competitively employers who take less effective precautions to protect their employees. But only prospective liability creates an incentive for occupational safety measures.



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tionality of the employers' challenged liability must take into account the retroactive nature of the liability:

"The retrospective aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former. Thus, in this case the justification for the retrospective imposition of liability must take into account the possibilities that the Operators may not have known of the danger of their employees' contracting pneumoconiosis, and that even if they did know of the danger their conduct may have been taken in reliance upon the current state of the law . . . ." *Ante*, at 12-13.

The Court then acknowledges that the Act would not be justified "on any theory of deterrence . . . or blameworthiness." *Id.*, at 13. It nonetheless sustains the provision for retroactive liability, reasoning as follows:

"We find . . . that the imposition of liability for the effects of disabilities bred in the past is justified as a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor—the operators and the coal consumers." *Id.*, at 13-14.

"We are unwilling to assess the wisdom of Congress' chosen scheme by examining the degree to which the 'cost-savings' enjoyed by operators in the pre-enactment period produced 'excess' profits, or the degree to which the retrospective liability imposed on the early operators can now be passed on to the consumer. It is enough to say that the Act approaches the problem of cost-spreading rationally . . . ." *Id.*, at 14-15.

In my view whether the retroactive liability is consti-



tutional is a considerably closer question than the Court's treatment suggests. The rationality of retrospective liability as a cost-spreading device is highly questionable.

If coal mining concerns actually enjoyed "excess" profits in the pre-enactment period by virtue of their nonliability for pneumoconiosis, and if such profits could be quantified in some discernible way, Congress rationally could impose retrospective liability for the benefit of the miners concerned. But, in this context, the term "excess profits" must mean profits over and above those that Operators would have made in years and decades past if they had set aside from current operations funds sufficient to provide compensation, although under no obligation to do so. It is unlikely that such profits existed. The coal industry is highly competitive and prices normally are determined by market forces. One therefore would expect that, had a compensation increment been added to operating costs, the Operators over the long term simply would have passed most of it on to consumers, thereby leaving their profitability relatively unaffected. In short, the talk of "excess profits" in any realistic sense is wholly speculative.

Nor can I accept without serious question the Court's view that the costs now imposed by the Act may be passed on to consumers. Firms burdened with retroactive payments must meet that expense from current production and current sales in a market where prices must be competitive with the prices of firms not so burdened. One ordinarily would expect that if burdened firms are to meet both competitive prices and their retroactive obligations, their profits necessarily will be less than those of their competitors. Thus, the burdened firms in all likelihood will have to bear the costs of the retroactive liability rather than passing those costs on



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to consumers. And they must bear such costs quite without regard to whether "excess profits" may have been made in some earlier years.<sup>6</sup>

In some industries conditions might be such that the cost of retroactively imposed benefits could be spread to consumers. It seems most unlikely, however, that the coal industry is such an industry. A notable fact about coal mining is that the industry currently employs only about 150,000 persons, whereas in 1939 it employed nearly 450,000. Brief for Operators 24. The reduced scale of employment in the coal industry, combined with the liability to former miners and their survivors, means that retroactive obligations almost certainly will be disproportionate to the scale of current operations.<sup>7</sup> Moreover, it is unlikely that liability to former miners will be distributed randomly across the industry, as it is dictated by historical patterns that may be wholly unrelated to the present contours of the industry. Two examples are illustrative: (i) Some coal-mining concerns have been in the mining business for decades, while some competitors have commenced operation more recently. The exposure of the former group to claims of employees long separated from active employment is likely to be significantly greater than that of their competitors. (ii) Some com-

<sup>6</sup> It is, of course, impossible to spread the cost to "coal consumers" who "profited from the fruits of [former employees'] labor." *Ante*, at 14. A coal mining concern cannot retroactively increase its prices to the former customers who benefitted from the pre-1969 labors of former miners. The only consumers, therefore, who could bear these burdens are those who purchase coal currently. But in a free market such customers cannot be expected to pay a reparation add-on for coal produced by disadvantaged coal companies when the same product is readily obtainable from others at a lower price.

<sup>7</sup> Indeed, the number of former miners and survivors whom an individual employer is obliged to compensate could be larger than the employer's present workforce.



panies engaged in coal mining in years past on a much larger scale and with many more employees than currently. This is not an unusual situation in a "depleting asset" industry, where smaller companies often lack the resources with which to continue the acquisition and development of new properties. Stronger competitors, on the other hand, may have operated on a constant or an increasingly large scale.<sup>8</sup> In each case the competitively disadvantaged companies may be unable to spread a substantial portion of their costs to consumers. In view of these considerations it is unrealistic to think that the Act will spread costs to "the operators and the coal consumers," *ante*, at 14, and thus I question the Court's conclusion that the Act is rational in imposing retroactive liability.

### III

Despite the foregoing, I must concur in the judgment on the record before us. Congress had broad discretion in formulating a statute to deal with the serious problem of pneumoconiosis affecting former miners. *E. g.*, *Richardson, supra*; cf. *Williamson v. Lee Optical Co.*, 348 U. S. 483 (1955). Nor does the Constitution require that legislation on economic matters be compatible with sound economics or even with normal fairness. As a result, economic and remedial social enactments carry a strong presumption of constitutionality, *e. g.*, *United States v. Carolene Products Co.*, 304 U. S. 144, 148 (1938), and the Operators had the heavy burden of showing the Act to be unconstitutional.

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<sup>8</sup> In addition, the incidence of liability to former miners may be skewed artificially by the regulation imposing liability upon the company which last employed the claimant without regard to previous employment with other companies. 20 CFR § 725.311 (1976). The validity of this regulation remains to be considered. See *ante*, at 9-10.

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The constitutionality of the retrospective liability in question here ultimately turns on the sophisticated questions of economic fact suggested above, and these facts are likely to vary widely among the Operators.<sup>9</sup> In this case, however, decided on the Government's motion for summary judgment, the Operators have failed to make any *factual* showings that support their sweeping assertions of irrationality. Although I find these assertions strongly suggestive that Congress has acted irrationally in pursuing a legitimate end, I am not satisfied that they are sufficient—in the absence of appropriate factual support—to override the presumption of constitutionality. Accordingly, I agree that the Government was entitled to summary judgment on this record.

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<sup>9</sup> I would not foreclose the possibility that a particular coal mining concern, in a proper case, may be able to show that the impact of the Act on its operations is irrational. Cf. *ante*, at 22.



SUPREME COURT OF THE UNITED STATES

Nos. 74-1302 AND 74-1316

W. J. Usery, Jr., Secretary  
of the United States De-  
partment of Labor,  
et al., Appellants,

74-1302 v.

Turner Elkhorn Mining  
Company et al.

Turner Elkhorn Mining  
Company et al.,  
Appellants,

74-1316 v.

W. J. Usery, Jr., Secretary  
of the United States De-  
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On Appeals from the United  
States District Court for  
the Eastern District of  
Kentucky.

[July 1, 1976]

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## 2. USERY v. TURNER ELKHORN MINING CO.

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THE C. J.	W. O. D.	W. J. B.	P. S.	B. R. W.	T. M.	H. A. B.	L. F. P.	W. H. R.
					12/16/75			
Concur in the judgment 6/16/76		Join TM 4/2/76	1st draft Concurring in Part & dissenting in part 5/25/76 2nd draft 6/18/76	Join TM 4/8/76	1st draft 4/1/76 2nd draft 6/16/76	Join TM 6/7/76	Concurrent opinion 6/26/76 2nd draft 6/30/76	<del>Join TM</del> Join PS 5/25/76
					74-1302 <del>Dunlop</del> <sup>Usery</sup> v. Turner Elkhorn 74-1316 Turner Elkhorn v. <del>Dunlop</del> <sup>Usery</sup>			